(19,259.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 202.

ALICE I. BIRRELL, PLAINTIFF IN ERROR,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 24th day of February, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.
W. H. SHANKLAND, Clerk.

Remittitur, February 25th, 1903.

ALICE I. BIRRELL, Respondent,
ag'st
THE NEW YORK AND HARLEM RAILROAD COMPANY and Another, Appellants.

Be it remembered, that on the 25th day of September in the year of our Lord one thousand nine hundred and one The New York and Harlem Railroad Company and another the appellants in this action came here into the court of appeals, by Ira A. Place their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department. And Alice I. Birrell the respondent in said action afterwards appeared in said court of appeals by
b Atwater & Cruikshank her attorneys, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

"That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14 and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this court of appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

Whereupon, the said court of appeals having heard this cause argued by Mr. Ira A. Place of counsel for the appellants, and by Mr. Alfred B. Cruikshank of counsel for the respondent, and after due deliberation had thereon did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and complaint dismissed without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed and complaint dismissed without costs as aforesaid.

c And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 25th, 1903.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

d In the Court of Appeals.

ALICE I. BIRRELL, Plaintiff Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Case on Appeal.

Atwater & Cruikshank, attorneys for plaintiff-respondent, borough of Manhattan, N. Y. city, N. Y.

Ira A. Place, attorney for defendants-appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

1 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Statement under Rule 41.

This action was commenced on January 27th, 1897. The summons and complaint were served on the defendant railroad companies on that day. The answers of the defendant railroad com-

panies were served on the plaintiff on the 29th day of March, 1897. This action was first tried before the Hon. Miles Beach, justice, on the 3d, 4th and 5th days of January, 1899. The defendant railroad companies having appealed from the judgment entered upon the said trial, the appellate division of the supreme court reversed the judgment and ordered a new trial.

The names of the original parties are as they appear in the above-entitled action in full; no change in parties or attorneys has
2 taken place pending the action, except that by an order entered herein on the 17th day of April, 1900, Ira A. Place, Esq., was substituted attorney for the defendants in the place and stead of Frank Loomis, Esq.

Supreme Court, City and County of New York.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated January 25th, 1897.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

Office and post office address, No. 115 Broadway, New York city.

3 Supreme Court, City and County of New York.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Complaint.

The plaintiff complains of the defendants and alleges, upon information and belief:

I. That at all the times hereinafter mentioned each of the defendants was, and now is, a domestic corporation created for the purpose of building, maintaining and operating a steam railroad.

II. That the plaintiff now is, and has been since September 14th, 1893, seized in fee simple and in possession of a lot of land, with the building thereon, situated on the northeast corner of Park avenue and One hundred and twenty-third street, in New York city, bounded and described as follows, viz:

Beginning at the northeast corner of Park avenue and One hundred and twenty-third street and running thence thirty-five (35) feet easterly along the northerly side of One hundred and twenty-third street; thence northerly and parallel with the easterly side of Park avenue one hundred (100) feet eleven (11) inches to the middle
4 of the block; thence westerly and parallel with the northerly side of One hundred and twenty-third street thirty-five (35) feet to the easterly side of Park avenue, and thence southerly along the easterly side of Park avenue one hundred (100) feet and eleven (11) inches to the point or place of beginning.

III. The said Park avenue in the city of New York (formerly known as Fourth avenue) is and has been since prior to the year 1870 a public street in said city, and was, prior to the year 1870, opened and established as a public street of the city of New York by proceedings taken under and in accordance with an act of the legislature of the State of New York, passed April 9th, 1813, being chap. 86 of the Laws of 1813, entitled "An act to reduce several laws relating particularly to the city of New York in to one act," and the statutes amendatory of and supplemental to said act.

IV. By virtue of the proceedings so taken under said statutes above mentioned, the title to said Park avenue was acquired and has always been and is now held by the city of New York, in trust that the same be appropriated and kept open for or as part of a public street, avenue or place forever, and the plaintiff's predecessors in title to the premises above mentioned were, during the time of their respective seizin and possession, thereof and plaintiff, since her seizin and possession of the same, has been and now is seized and possessed of an easement appurtenant to said premises to have the said Park avenue kept open and used only as a public street or avenue, in like manner as other public streets and avenues in the city of New York were when said avenue was laid out and opened and now are and of right ought to be used; and since said Park avenue was opened and established as a public street aforesaid, there have been
5 and now are attached to said premises above mentioned, and appurtenant thereto, easements of light, air and access in and over Park avenue, for the benefit of said premises and of plaintiff.

V. That prior to April 1st, 1873, the defendant The New York and Harlem Railroad Company had constructed and was operating a steam railroad over the surface of Park avenue, in front of said premises, and on or about April 1st, 1873, the said New York and Harlem Railroad Company leased to the defendant The New York Central and Hudson River Railroad Company its said railroad on said Park avenue, and all its rights therein for the term of four hundred and one years.

VI. That subsequent to said lease, the defendants, without right or authority as against the plaintiff or her predecessors in title, excavated the said Park avenue in front of the premises above mentioned, and constructed in the cut or depression formed by such excavation a railway, with numerous tracks, for the operation of a steam railroad, and the defendants, for more than six years past, have maintained upon that portion of Park avenue which is subject to plaintiff's easements as aforesaid, said railway in said cut or depression, with walls of masonry extending above the surface of said portion of said avenue, and at the present time said railway is, and for more than six years past has been, operated by trains drawn by steam engines, and under the said lease said railway is and has been maintained and operated as aforesaid for the benefit of both defendants.

VII. That in or about April, 1893, defendants began constructing, and have since continued to construct, and have in part erected and since maintained upon that portion of Park avenue, which is
6 subject to plaintiff's easements as aforesaid, a permanent elevated railway structure of iron and steel, supported by columns of iron and steel, standing on pedestals of masonry embedded in the soil of said avenue. The said structure rises many feet above the surface of said avenue, and substantially and materially interferes with and impairs the easements of light, air and access as aforesaid appurtenant to the premises of plaintiff.

VIII. The defendants threaten and intend to maintain said elevated railway structure and to add thereto and enlarge and strengthen the same, and upon completion thereof to operate thereon trains of cars, drawn by steam engines, and the defendants intend to permanently maintain and operate the said structure for the uses and purposes of a steam railroad.

IX. That by reason of the said acts of the defendants the easements appurtenant to plaintiff's said premises have been trespassed upon and injured, and the said premises have been deprived of light, air and access and the privacy thereof invaded, and the stability of the buildings thereon impaired, and the damages already sustained by the plaintiff, in consequence thereof, amount to the sum of five thousand (5,000) dollars, besides which, the fee value of plaintiff's premises has been greatly diminished thereby.

X. That said additions to and enlargement of said elevated railway structure and the running of trains thereon as aforesaid will, to a still greater extent, deprive said premises of light, air, access, privacy, stability, quiet and other rights, and the easements appurtenant to said premises as aforesaid will be still further appropriated by the defendants and still greater and additional damages
7 will be inflicted upon said premises, and the injuries hereinbefore described will be greatly increased and intensified.

XI. That said acts of the defendants have been, are and will be without warrant of law, without consent of plaintiff and without compensation to her, and that the said acts and the injuries com-

plained of are and will be constant and continuous trespasses upon plaintiff's property and rights aforesaid, and to prevent a multiplicity of suits and to afford plaintiff adequate relief, the equitable interference of this court is necessary.

Wherefore plaintiff demands judgment:

(1.) For the sum of five thousand ($5,000) dollars, as and for damages for the trespasses committed by defendant-, as above stated.

(2.) For an injunction perpetually enjoining and restraining the defendants, and each of them, from further maintaining or operating the above described elevated railroad in front of plaintiff's premises, and a judgment directing the removal thereof.

(3.) For such other and further relief as may be just, with the costs of this action.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

CITY AND COUNTY OF NEW YORK, ss.:

Alice I. Birrell, being duly sworn, says: That she is the plaintiff herein; that she has read the foregoing complaint, and the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

ALICE I. BIRRELL.

Sworn to before me this 25th day of January, 1897.

[SEAL.]

F. B. FRENCH,
Notary Public, N. Y. Co.

8 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and THE NEW York Central & Hudson River Railroad Company, Defendants.

First.

The separate answer of the defendant The New York & Harlem Railroad Company herein:

1. Admits the allegations of the complaint contained in the paragraph thereof numbered "I."

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint contained in the paragraphs thereof numbered "II.," "IX.," and "X."

3. Admits that certain portions of Park avenue are a public street, and that such portions were prior to the year 1870 a public street, and that such portions were prior to the year 1870 opened and established as a public street by the city of New York by proceedings

taken under and in accordance with an act of the legislature of the State of New York, passed April 9th, 1813, being chapter 86 of the Laws of 1813, entitled "An act to reduce several laws relating
9 particularly to the city of New York into one act," and the statutes amendatory of and supplemental to said act, and alleges that whatever title the said city acquired to the land between the exterior lines of Park avenue was subject nevertheless to all the rights of the defendant The New York & Harlem Railroad Company to maintain and operate its railroad existing in Park avenue at the time said proceedings were taken, and also to the rights of said company to maintain and operate any railroad therein which might, by subsequent direction and authority of the legislature of the State of New York, be constructed in said Park avenue, and denies any knowledge or information sufficient to form a belief as to each and every other allegation of the complaint contained in the paragraph thereof numbered "III."

4. Admits that by virtue of the proceedings taken under the provisions of said chapter 86 of the Laws of 1813, and the acts amendatory thereof and supplemental thereto, the title to a portion of the land contained between the exterior lines of Park avenue was required, and always has been, and is now held by the city of New York in trust as part of a public street, but denies that any portion of the land between the exterior lines of Park avenue heretofore used and occupied, or now or hereafter to be used and occupied, for the purposes of the railroad of the defendant The New York and Harlem Railroad Company, was acquired by said city in trust, that the same be appropriated and kept open for or as part of a public street, avenue or place forever, and denies any knowledge or information sufficient to form a belief as to each and every other allegation contained in the complaint in the paragraph thereof numbered "IV."

5. Admits the allegation of the complaint contained in
10 the paragraph thereof numbered "V.," that prior to April 1st, 1873, and prior to the year 1853 and the opening of Park avenue as a public street, the defendant The New York and Harlem Railroad Company had constructed and was operating a steam railroad within the lines of Park avenue, as shown on a map thereof made and filed pursuant to chapter 115 of the Laws of 1807, in front of said premises, and admits that on or about April 1st, 1873, the said The New York and Harlem Railroad Company leased to the defendant The New York Central and Hudson River Railroad Company all its said railroad north of 42d street, in the city of New York, for the term of four hundred and one years, but for the full purport and effect of the said lease this defendant begs leave to refer to the said lease with the same force and effect as if the said lease, or a copy thereof, were hereto annexed and formed a part of this answer.

6. Denies the allegation of the complaint contained in the paragraph thereof numbered "VI.," that subsequent to said lease the de-

fendants without right or authority as against the plaintiff or her predecessors in title, excavated the said Park avenue in front of the premises therein mentioned, and constructed in the cut or depression formed by such excavation, a railway with numerous tracks for the operation of a steam railway, and denies that the defendants for more than six years past have maintained upon that portion of Park avenue, which is subject to plaintiff's easements, a railroad with solid walls of masonry extending many feet above the surface of said portion of Park avenue, but admits and alleges that defendants have for more than twenty years prior to the commencement of this action, maintained a railroad over, through and upon a strip of land between 42d street and
11 the Harlem river, and in front of the premises described in the complaint, on each side of which is a public street known as Park avenue, and that said railroad over certain portions of said strip of land is constructed in a depression or cut, and that said railroad is, and for many years past has been, operated by trains drawn by steam engines; that under the said lease from this defendant to the defendant The New York Central and Hudson River Railroad Company said railroad has been maintained and operated by the defendant The New York Central and Hudson River Railroad Company, pursuant to the statutes of the State of New York in such case made and provided, and in accordance with the terms of the said lease.

7. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VII.," except that this defendant admits that the structure therein described rises above the surface of Park avenue, but denies that the same rises many feet above the surface thereof.

8. Denies the allegation of the complaint contained in the paragraph thereof numbered "VIII.," that this defendant threatens and intends to maintain said elevated railway structure, and to add thereto and to enlarge and strengthen the same, and upon completion thereof to operate trains of cars thereon, drawn by steam-engines, and that this defendant intends to permanently maintain and operate the said structure for the uses and purposes of a steam railroad.

9. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "XI."

10. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint not hereinbefore or hereinafter specifically controverted or admitted.

12 Second.

For a further second and separate defense this defendant alleges upon information and belief, that prior to the commencement of this action, and on or about the 21st day of November, 1883, George W. Rogers, then the alleged owner of the premises described in the complaint herein, executed, duly acknowledged and delivered to

the Emigrant Industrial savings bank, a mortgage upon the premises described in the complaint herein to secure the payment of a large sum of money, to wit, the sum of $32,500.00, with interest, that the said mortgage was duly recorded in the office of the register of the city and county of New York, and that the same remains undischarged of record, and that the owner thereof has not been made a party to this action, and that on or about the 25th day of November, 1895, Alice Isabel Birrell, then the alleged owner of the said premises, executed, duly acknowledged and delivered to Frederick W. Pitcher, a mortgage upon said premises to secure the payment of a large sum of money, to wit, the sum of $2,750.00, with interest, that the said mortgage was duly recorded in the office of said register, and that the same remains undischarged of record, and that the owner thereof has not been made a party to this action.

Third.

For a further third and separate defense the defendant The New York and Harlem Railroad Company alleges upon information and belief:

That pursuant to the provisions of an act of the legislature of the State of New York, entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York and for other purposes," passed April 3d, 1807, and
13 known as chapter 115 of the Laws of 1807, a map or plan exhibiting the public streets and avenues of the city of New York was duly made and filed April 1, 1811, exhibiting among other avenues, Fourth avenue, of the width of one hundred feet, extending from the southerly side of the Harlem river to and below Forty-second street.

That by the provisions of an act of the legislature, entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831, and known as chapter 263 of the Laws of 1831, the defendant The New York and Harlem Railroad Company was incorporated and was authorized, among other things, to construct a railroad from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, and that pursuant to the requirements of said act the defendant The New York and Harlem Railroad Company, duly located the route of said railroad and made a survey of such location and filed a map thereof in the register's office of the city and county of New York on the 22d day of October, 1831, the said map having been approved by a joint resolution of the common council, approved by the mayor, October 11, 1831, declaring their approval of the map and of the route of said railroad indicated thereon; that said railroad, as located as aforesaid, occupied a strip of land twenty-four feet in width extending from Twenty-third street to the Harlem

river, the centre line of said strip coinciding with the centre line of Fourth avenue as laid down on said map, filed April 1, 1811.

That subsequently, and on the 22d day of December, 1831, the mayor approved an ordinance passed by the board of aldermen on the 16th day of December, 1831, and by the board of assistants
14 on the 19th day of December, 1831, granting permission to said New York and Harlem Railroad Company to construct a railroad from Twenty-third street to the Harlem river, along Fourth avenue, in conformity with said map, and that said company, by articles of agreement executed January 9th, 1832, duly covenanted to perform all the conditions and requirements contained in said ordinance.

That after the incorporation of the defendant The New York and Harlem Railroad Company, and prior to the acquisition by the city of New York of any title to any part of Fourth avenue, north of Forty-second street, the defendant The New York and Harlem Railroad Company acquired title in fee for the purpose of constructing and operating its railroad thereon to a strip of land extending southerly from the southerly line of the Harlem river to Forty-second street, a portion whereof is in front of the premises described in the complaint, of the width of twenty-four feet, situate within the exterior lines of Fourth avenue, as designated on said map or plan, the centre line thereof coinciding with the centre line of said Fourth avenue, and also the right to slope any embankment or excavation of its railroad structure to the exterior lines of the said Fourth avenue; and that many years prior to the acquisition of any title by the city of New York to any part of Fourth avenue, the defendant The New York and Harlem Railroad Company, had constructed its railroad structure and had in operation its railroad upon the same, and its roadway acquired as aforesaid, and upon, along, above and below the grade of the adjacent land, and continued the operation of its railroad upon its railroad structure, as so located and constructed, until the changes required by the provisions
15 of chapter 880 of the Laws of 1867, and by the provisions of chapter 702 of the Laws of 1872, as hereinafter set forth, were successively made.

That pursuant to the provisions of an act of the legislature, passed upon the memorial of the mayor, aldermen and commonalty of the city of New York, therefor, and entitled "An act to alter the map or plan of the city of New York," passed April 27th, 1837, and known as chapter 274 of the Laws of 1837, said Fourth avenue was widened to the width of one hundred and forty feet, and the said widening from one hundred to one hundred and forty feet was by reason of the location and characteristics of the railroad and railroad structures theretofore built by the defendant The New York and Harlem Railroad Company, entending between Forty-second street and the Harlem river, and was for the purpose of giving an avenue of the necessary width for the increasing needs and population of the city of New York.

That the aforesaid acquisition of title by said defendant, The New York and Harlem Railroad Company, with the right to slope any embankment or excavation for its railroad structure to the exterior lines of said Fourth avenue, at that time one hundred feet in width as aforesaid, and the aforesaid construction by this defendant The New York and Harlem Railroad Company, of its railroad structure, and the aforesaid operation of its railroad upon the same and its roadway, was many years prior to the alleged acquisition by the plaintiff of title (if she acquired any title) to the premises described in the complaint, and to the erection of any building or buildings on said lands, and such acquisition of title, right of construction and operation of said railroad was pursuant to and by authority of said act of incorporation of said defendant The
16 New York and Harlem Railroad Company, and of the acts amendatory thereof and supplemental thereto, and with the consent and acquiescence of the predecessor or predecessors in title (if the plaintiff has any) of the plaintiff.

That pursuant to the provisions of section six of an act of the legislature entitled "An act to amend an act entitled 'An act relating to the New York and Harlem Railroad Company,' passed May 7, 1840, and the acts amending the same," passed March 29th, 1848, and known as chapter 143 of the Laws of 1848, the New York and New Haven Railroad Company (now known as the New York, New Haven and Hartford Railroad Company), a railroad corporation organized under the laws of the State of Connecticut, acquired from said defendant The New York and Harlem Railroad Company, the right to run the cars of the said New York and New Haven Railroad Company upon the tracks of said defendant The New York and Harlem Railroad Company, from a point of junction near Williams bridge, to and into the city of New York, and did, and every since the year 1848 has, run its cars and trains upon the railroad of said defendant The New York and Harlem Railroad Company, from said point of junction to and along and upon said tracks from the southerly side of the Harlem river to Forty-second street.

That by proceedings instituted by the mayor, aldermen and commonalty of the city of New York, in or about the year 1850, for the opening of Fourth avenue (now known as Park avenue) from Thirty-eighth street to the Harlem river, resulting in an order of confirmation entered October 29th, 1853, the said city assumed to acquire title to the land between the exterior lines of Fourth avenue from Thirty-eighth street to the Harlem river, subject, nevertheless,
17 to all the rights of the defendant The New York and Harlem Railroad Company, to maintain and operate its said railroad in said avenue.

That on the 10th day of May, 1867, the legislature passed an act entitled "An act for the protection of persons traveling upon Fourth avenue in the city of New York," and known as chapter 880 of the Laws of 1867, which in terms required and provided that the defend-

ant The New York and Harlem Railroad Company should do certain work and perform certain acts, and among other things, that it should erect retaining walls upon the sides of its railroad below Ninety-second street, and between Seventy-eighth and Eighty-eighth streets, surmount said retaining walls with iron railing, and arch over its roadway from Eighty-eighth street to Ninety-second street, and that the city of New York should pay to the defendant The New York and Harlem Railroad Company one-half of the expense thereof, and that the filling in and grading about the said arch should be done by the city of New York, at its sole expense; and this defendant alleges that all the work and acts required to be done by said last mentioned act were duly performed.

That on the 14th day of May, 1872, the said legislature passed an act entitled "An act to improve and regulate the use of Fourth avenue in the city of New York" and known as chapter 702 of the Laws of 1872, whereby an established statutory grade and roadway between Forty-fifth street and the Harlem river were provided for the said railroad of the defendant The New York and Harlem Railroad Company, and whereby said defendant was required to construct such viaducts, foot and road bridges over the same and such excavations and tunnels under the same, with openings for proper ventilation,
18 as should be required by the plans and specifications of a board of engineers appointed by said act to execute, direct and superintend the said improvement; and also requiring one-half the cost of said improvement to be paid by the city of New York. That said improvement was accordingly carried out and the requirements of said act fully complied with and the railroad structure mentioned in the complaint as existing in front of the premises discribed in the complaint prior and up to the month of April, 1893, was constructed and has since been maintained and operated by the defendants pursuant to said last mentioned act.

That on the first day of April, 1873, said defendant The New York and Harlem Railroad Company leased all of its railroad from Forty-second street northwardly to the defendant The New York Central and Hudson River Railroad Company for a term ending April 1st, 2274, and that the said defendant The New York Central and Hudson River Railroad Company entered into possession and is now in the sole occupation and enjoyment of the said demised premises.

That on the 19th day of April, 1892, the said legislature passed an act entitled, "An act to regulate, improve and enlarge Park avenue above 106th street, in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, street or railroads that may be necessary by reason of such change in structure and grade and increased ele-

vation of bridges, and for other purposes," and known as chap-
19 ter 339 of the Laws of 1892; that said act was duly amended by an act of said legislature, passed May 8th, 1894, and known as chapter 548 of the Laws of 1894, and was also further amended by an act of said legislature passed May 13th, 1896, and known as chapter 594 of the Laws of 1896.

That under and pursuant to the provisions of section 13 of said act, chapter 339 of the Laws of 1892, the board therein designated as "the board for the Park Avenue improvement above One hundred and sixth street," was duly appointed by the mayor of the city of New York, on or prior to the 29th day of April, 1892, was duly organized as required in said act on that date, and thereupon proceeded to and took entire charge and control of the improvement directed in said act, and still has entire charge and control of the same; that pursuant to the authority vested by said act as amended as aforesaid, and in obedience to its explicit directions, the said board entered into and executed certain contracts with various parties for the construction and carrying out of said improvement, according to certain plans prepared by said board, approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, and that all the structures described in the complaint, including all temporary structures, required in the construction of said improvement, or necessary for the operation of trains during the making of said improvement, have been erected by such contractors under the sole supervision and control of said board, and in part at the expense of the mayor, aldermen and commonalty of the city of New York, as required by said act as amended as aforesaid, and that all the provisions of said chapter 339 of the Laws of 1892, as amended, have been and are being duly carried out and executed.

20 That all the changes in the original railroad bed and structures of the defendant The New York and Harlem Railroad Company, which have been or are being made, including all temporary structures, were and are necessary and requisite in order to carry out the provisions of the said acts, and were necessary and required for the purpose of and in order to regulate, improve and enlarge Park avenue in accordance with the provisions of the said acts, and that the defendant The New York and Harlem Railroad Company, has not operated any trains on said structure, or any part of it, temporary or otherwise.

Fourth.

For a further fourth and separate defense the defendant The New York and Harlem Railroad Company alleges, upon information and belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court.

Fifth.

For a further fifth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to her predecessor or predecessors in title within twenty years next preceding the commencement of this action.

Sixth.

For a further sixth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pre-
21 tended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to her predecessor or predecessors in title within ten years next preceding the commencement of this action.

Seventh.

For a further seventh and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to her predecessor or predecessors in title within six years next preceding the commencement of this action.

Eighth.

For a further eighth and separate defense the defendant The New York and Harlem Railroad Company alleges:

That it entered into possession of that part of Park (formerly Fourth) avenue in front of, or adjacent to, the premises claimed to be owned by the plaintiff, which is now and heretofore has been occupied by the railroad and railroad structure of the defendant The New York and Harlem Railroad Company, under a claim of title, exclusive of any other right, founding such claim upon a written instrument or instruments as being a conveyance or conveyances of said premises or of the right, franchise and easement to construct, maintain and operate railroads thereon, and that there has been a continued occupation, possession and use of the said franchises, rights and easements included in said written instrument or instruments, or of some part thereof, by the defendant The New York and Harlem Railroad Company, and the defendant The New York Cen-
22 tral and Hudson River Railroad Company, under said lease, for twenty years next preceding the commencement of this action, under the same claim.

Wherefore, the defendant The New York and Harlem Railroad Company demands that the complaint be dismissed, with costs.

FRANK LOOMIS,
Attorney for the Defendant, The New York and Harlem Railroad Company.

Office and post-office address, Room 10, Grand Central depot, 42d St. and Vanderbilt Ave., New York city, N. Y.

CITY AND COUNTY OF NEW YORK, ss:

Edward V. W. Rossiter, being duly sworn, says that he is the treasurer of The New York and Harlem Railroad Company, the above-named defendant; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 23d day of March, 1897.

H. B. DWYER,
Notary Public, New York County.

The separate answer of the New York Central and Hudson River Railroad Company contains substantially the same allegations as the separate answer of the New York and Harlem Railroad Company.

23 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Decision.

The issues in the above-entitled action having heretofore duly come on for trial before the Hon. Frederick Smyth, one of the justices of this court, on the 7th and 8th days of May, 1900, and the respective parties having appeared and the cause having been duly tried and the said justice having thereafter died, leaving the cause undetermined, and the same thereafter regularly coming on for trial before the Hon. Abraham R. Lawrence, one of the justices of this court, on the 5th day of November, 1900, and the respective parties having thereupon upon said trial stipulated in writing and in open court that the case be submitted for decision to the said justice on the evidence as appearing in the stenographer's minutes of

the testimony, and upon the exhibits used and put in evidence upon the said former trial before Mr. Justice Smyth, and upon the complete record of said trial, with the same force and effect as if the said justice had presided at the time of the former trial, and that all said evidence and testimony was to be considered as being
24 taken before said trial justice *nunc pro tunc*, as of the dates of May 7th and 8th, 1900, and the submission having been made and the second trial having been had accordingly, and the said original records, exhibits, evidence and testimony having been duly read and submitted, and the same having been duly considered,

Now, therefore, I, the said Abraham R. Lawrence, trial judge, do make this decision stating concisely the grounds upon which the issues herein are decided, as follows:

First. The plaintiff is, and since September 13, 1893, has been, the owner and in possession of the premises described in the complaint and situated on the northeast corner of Park avenue and 123d street, having a frontage of one hundred feet and eleven inches on said Park avenue, and has had during the period of her ownership as aforesaid certain easements of light, air and access in Park avenue and appurtenant to her said premises.

Second. During all the times herein mentioned the defendant The New York and Harlem Railroad Company was the owner of the railroad and railroad structures in Park avenue, in front of the plaintiff's premises, and the defendant The New York Central and Hudson River Railroad Company was at all times the lessee of said railroad and structures under a lease, dated April 1st, 1873, for a period of 401 years from said date.

Third. Said railroad prior to August, 1894, was operated along the centre of said avenue, in front of the plaintiff's premises, in a depressed cut, which was about fifteen feet in depth and about fifty feet in width at the bottom, with a slope of retaining walls, which increased the width of the cut to fifty-two feet at the top, surmounted with a parapet wall.

25 Fourth. That by proceedings duly had in the court of chancery of the State of New York, entitled, In the matter of the petition of the New York and Harlem Railroad Company, in relation to certain lands, &c., and by a decree entered therein dated December 28th, 1832, the said defendant The New York and Harlem Railroad Company, became the owner in fee of a strip of land twenty-four feet wide in front of plaintiff's premises, running north and south through the centre of Park avenue, and that upon this strip and within its boundaries the defendant had the right to erect the viaduct structure as at present erected on said Park avenue, and to use the same for the purpose of a railroad, and I further find that under and by virtue of the charter of the defendant, The New York and Harlem Railroad Company, and the acts amendatory thereof and supplemental thereto, the various resolutions, consents, ordinances and acts of the mayor, aldermen and commonalty of the city of New York, the said decree of the court of chancery, the proceed-

ings in the supreme court in the matter of the application of the mayor, aldermen, and commonalty of the city of New York relative to the opening of Fourth avenue; the various acts of the legislature upon which said proceedings were taken; also chapter 702 of the Laws of 1872, and the acts performed by the defendants thereunder, the lease of the New York and Harlem Railroad Company to the New York Central and Hudson River Railroad Company, dated April 1st, 1873, and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or her predecessors in title, the said defendant railroad companies acquired the right without
26 liability to the plaintiff to have, maintain and use their railroad and railroad structures over the remainder of said bed or roadway of fifty feet or thereabouts, as the same were maintained and used prior to August, 1894, as hereinbefore described.

Fifth. In compliance with and pursuant to chapter 339 of the Laws of 1892, and under the supervision of the board of the Park Avenue improvement above 106th street, the following changes and alterations were made: The masonry walls and parapets along said Park avenue were removed, the cut was filled up and a new permanent viaduct railroad structure of iron and steel was erected in the place thereof in front of plaintiff's premises, being about twenty-one feet nine inches in height and sixty feet ten inches in width at the southerly end of plaintiff's premises, and seventy-five feet and three and one-half inches in width at the northerly end of plaintiff's premises. Said defendant began to operate its trains on said permanent structure on February 16th, 1897, and intends to permanently continue said operation. The said permanent structure and the operation of trains thereon outside of the twenty-four foot strip are, and since February 16th, 1897, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to said premises.

Sixth. By reason of the maintenance and operation of defendants' railroad in front of plaintiff's premises on that part of the roadway not included in the strip of twenty four feet, which said railroad owns in fee as aforesaid, the fee value of said premises on May 8th, 1900, was depreciated in the sum of $7,050, and the rental value of said premises was from the same cause depreciated in the
27 period from February 16th, 1897, down to May 8th, 1900, in the sum of $3,360; that is to say, that the rental value of said premises was depreciated in said period to the amount of $3,360 below what it would have been had the change and alteration made under the statute of 1892, as aforesaid, been confined to said twenty-four foot strip; and the fee value of said premises was on May 8th, 1900, the date of the trial, permanently depreciated to the amount of $7,050 below what would have been the said value had such change and alteration been confined to said strip. In assessing such damage and depreciation I have considered all benefits conferred on said premises by said changes and alterations.

The plaintiff is entitled to judgment as follows:

I. To a money judgment against the defendants for the sum of $3,360, with interest thereon from May 8th, 1900, to the date of the entry of judgment.

II. To an injunction restraining the defendants from the further maintenance and operation of the said structure and railroad in front of the plaintiff's premises on the northeast corner of Park avenue and 123d street above mentioned, outside of the twenty-four foot strip as aforesaid, but said injunction shall not become operative until thirty days after the notice of entry of judgment herein, and if during the said period the defendants or either of them shall pay or tender to the plaintiff the sum of $7,050 and interest thereon from May 8th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated and to receive from the plaintiff a proper grant and conveyance of such right, together with a release
28 of all claims for damages on account of the maintenance and operation of said structure and railroad as aforesaid since May 8th, 1900, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.

In case the defendants do not within such time acquire the right as against the plaintiff as owner of said premises to maintain and operate their structure and railroad as aforesaid, the injunction shall become operative.

I direct the entry of a judgment as above with the costs of the action and an extra allowance of $570.50.

Dated New York, January 14, 1901.

ABRAHAM R. LAWRENCE, J. S. C.

29 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and The New York Central & Hudson River Railroad Company, Defendants. } Judgment.

The issues in the above-entitled action having been regularly brought on for trial before the Hon. Abraham R. Lawrence, at a special term of this court, held on the 5th day of November, 1900, and said justice having made and filed his decision directing judgment in favor of the plaintiff and against the defendants, as hereinafter stated, and the plaintiff's costs having been duly taxed at the sum of $983,85/100.

Now, on motion of Atwater & Cruikshank, plaintiff's attorneys, it is adju-ged,

I. That the plaintiff, Alice I. Birrell, recover of the defendants,

The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of $3,360 as damages from the trespasses of the defendants upon the premises on the northeast corner of Park avenue and 123d street, New York city, for the period from February 16th, 1897, to May 8th, 1900, with interest thereon from May 8th, 1900, to the date of the
30 entry of this judgment, amounting to the sum of $140; also the sum of $983.85/100 for plaintiff's costs in this action, amounting in all to the sum of $4,483.85/100, and that plaintiff have execution therefor.

II. That the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of said viaduct structure and railroad in front of the plaintiff's premises, northeast corner of Park avenue and 123d street, outside of the twenty-four foot strip in the centre of said avenue, but said injunction shall not be operative until thirty days after notice of entry of judgment herein, and if during said period the defendants or either of them shall pay or tender to the plaintiff the sum of $7,050 with interest thereon from May 8th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated and to receive from the plaintiff a proper grant and conveyance of such right, together with a release or releases of all claims for damages on account of the maintenance and operation of said structure and railroad since May 8th, 1900, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.

In case the defendants do not within such time acquire the right as against the plaintiff as owner of said premises, to maintain and operate their structure and railroad, the injunction shall become operative.

III. Any and every tender of delivery, notice or payment herein provided for shall be made by or to the attorneys for the respective parties.

IV. Every party to this action shall have leave to move at the foot of this judgment for further direction.

31 V. No execution shall issue upon the money judgment herein until thirty days aftor the notice of entry of judgment.

Dated New York, January 14, 1901.

Enter.

ABRAHAM R. LAWRENCE, J. S. C.

WILLIAM SOHMER, Clerk.

32 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants. } Exception to Decision.

Please take notice that the defendants, and each of them, hereby except to the decision filed herein on the 18th day of January, 1901, and to each and every part of the same.

Dated, borough of Manhattan, New York city, January 24, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, N. Y. city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, N. Y. city, N. Y.

33 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants. } Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the 18th day of January, 1901, and from each and every part of said judgment.

Dated New York, January 24, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, New York city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, borough of Manhattan, New York city, N. Y.

34 Supreme Court, Special Term, Part IV.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Opinion.

LAWRENCE, *J.*:

In this case I am of the opinion that the plaintiff has sustained fee damage in the sum of $7,050, and the rental damage in the sum of $3,360. In reaching this conclusion I have taken into consideration the fact that the Harlem railroad had acquired title in fee simple to the strip of land twenty-four feet in width in Fourth (now Park) avenue in December, 1832, and that said avenue has always been used as a railroad street, and also the evidence with reference to the impairment of the easements appurtenant to the property of the plaintiff caused by the additional burden imposed upon the avenue by reason of the maintenance and use of the structure of the railroad company outside of and beyond the said strip of twenty-four feet, and all the evidence tending to show any impairment of the fee and rental value of the plaintiff's property arising from any other cause than the maintenance and use of such structure. The plaintiff is entitled to the costs of the action. Draw decision and judgment accordingly, and settle on three days' notice.

35 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

The issues thus joined were tried the second time before the Honorable Frederick Smyth, justice, at a special term, part IV., without a jury, on the 7th and 8th days of May, 1900. Justice Smyth having died without rendering any decision in the case the same was, by consent of both parties, submitted to the Honorable Abraham R. Lawrence, justice, upon the record made upon the trial before the Honorable Frederick Smyth, to decide with the same force and effect as if tried before him.

Alfred B. Cruikshank, Esq., and J. E. C. Thomson, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

It is admitted that this action was begun January 27th, 1897.

It is also admitted that the premises in suit formed a portion of lands which in 1830 were vested in Samson Adolphus Benson, at that time an infant.

36 It is stipulated that by various mesne conveyances the title was transmitted from Samson Adolphus Benson to Arthur W. Moore, who acquired title June 16th, 1893.

Plaintiff's counsel offered in evidence deed, from Arthur W. Moore and wife to Alice I. Birrell, dated September 13, 1893, recorded September 14th, 1893, in section 6, Liber 17 of Conveyances, page 212, the expressed consideration being $65,000 and conveying the premises in suit.

Received and marked "Plaintiff's Exhibit A."

Plaintiff's counsel offered in evidence chapter 115 of the Laws of 1807; also chapter 86 of the Laws of 1813; also chapter 274 of the Laws of 1837.

Received and marked "Plaintiff's Exhibits B, D and E."

Plaintiff's counsel offered in evidence a map prepared by the commissioners for the laying out of streets in the city of New York, filed April 1st, 1811.

Received and marked "Plaintiff's Exhibit C" (printed in appendix).

Also proceedings in the matter before the supreme court, entitled "In the matter of the mayor, aldermen and commonalty of the city of New York relative to the opening of Fourth avenue from 38th street to the northerly line or side of 135th street in the twelfth and eighteenth wards of said city."

Received and marked "Plaintiff's Exhibit F."

Also petition in said proceeding, the affidavits, the application, the rule for the appointment of commissioners, certain objections made by the New York and Harlem R. R. Co. and the re-

37 port of the commissioners, the final order confirming the report of the commissioners, entered November 15th, 1853, and the order of the general term affirming the order confirming the report, dated May 15th, 1854.

Received and marked "Plaintiff's Exhibit G."

Also damage map in said proceeding showing the New York and Harlem Railroad Co. as the owner of parcel 1080, consisting of a strip 24 feet wide in the centre of Park avenue, extending from the centre of 123d street to the centre of 124th street.

Received and marked "Plaintiff's Exhibit H" (printed in appendix).

It is admitted that an award of one dollar was made in the above-entitled proceeding to the New York and Harlem Railroad Company for said parcel 1080.

Plaintiff's counsel offered in evidence a statement of the rents collected from the premises in suit from June, 1884, to March, 1889.

Received and marked "Plaintiff's Exhibit K," and is as follows:

(Here follow tables marked pp. 38, 39, and 40.)

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41 Plaintiff's counsel offered in evidence photograph of the premises in suit and of the structure adjoining same, taken from the south side of East 123d street on May 5th, 1900.

Received and marked "Plaintiff's Exhibit N."

Also photograph of the structure in suit, taken from the westerly side of Park avenue to the south of 123d street on May 5th, 1900.

Received and marked "Plaintiff's Exhibit O."

Also photograph of the premises in suit and of the structure, taken from the easterly side of Park avenue to the south of 123d street.

Received and marked "Plaintiff's Exhibit P."

Also sketch or diagram showing the floor plan of the premises in suit.

Received and marked "Plaintiff's Exhibit Q."

GEORGE S. BIRRELL, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am the husband of the plaintiff in this case, and reside at 101 East 123d street, on the premises in question. I have had charge of the premises since they were bought, but had an agent part of the time. So far as the building is concerned I have had charge of it, and I attended to the purchase of it for the plaintiff originally. I remember when the property was bought in 1893; I had been there several times before.

I remember the Harlem railroad as it was operated in 1892, and prior thereto.

42 Q. Will you kindly describe the premises in question in a general way?

A. They are situated on the northeast corner of 123d street and Park avenue, 35 feet by 100 feet and 11 inches; the building is 35 by about 89 or 90 feet, 5 story and basement, red brick, ten apartments, nine of them have eight rooms and bath, one seven rooms and bath, steam heat, hot water, all modern improvements. It is a double flat, and was built, I think, in 1882. The entrance is on 123d street. The building faces south. There are 50 windows on Park avenue—24 on 123d street and 20 in the back of the building. The premises are in very good order, and have been kept in good order since Mrs. Birrell purchased them. They were in very fair repair when she bought them.

I made up the rent statements which have been put in evidence here, and they correctly state the rents of these different flats at those times. In the last rent statement put in evidence the letter V refers to vacancies, and the totals represent the actual rent received for the year, counting the vacancies. This building has in no way changed substantially since I purchased it. There have been no extensions or alterations made to it of any substantial character; it has been kept in good repair. At the present time I oc-

cupy the ground floor to the west, eight rooms and bath, and I have included that in my rent statement at $25.

Q. Is that a fair rent for it?

A. That is all I can get; I doubt if I can get that for it. I have been trying to rent it for the past four years. That is in the same proportion as the other flats. It used to rent very much higher at one time.

Q. Describe to the court the character of the structure on which the railroad was operated in front of your premises in 1892 just before you purchased them?

43 A. At that time it was running in a depressed cut about 18 or 20 feet deep, and at the corner of 123d street and Park avenue there was a bridge the full width of the street with 6 or 8 gas lamps on it, lighted at night-time, and the sidewalk on each side of this bridge was partitioned off, and the centre part of the street was occupied by this cut, which had a stone coping and an iron railing on it.

This cut was open at the top. I do not know how far down the avenue that cut began, but I should say just south of 116th street. To the best of my recollection that is where the trains entered the cut. I think it extended up to about 128th or 129th street. I used to pass there twice every day when I lived upon the Harlem road before I bought the property for Mrs. Birrell; I used to be up and down the road twice every day. The bridge that I spoke of was the full width of 123d street. It crossed Park avenue from our corner to the opposite corner. The tunnel ran in the centre of the avenue about 40 or 50 or 60 feet wide; then the streets were graded across this the full width of the street at 124th street, 125th and 123d street.

Q. How high was the top of the cut or opening with reference to the trains passing through?

A. If you were standing on the sidewalk at the corner you could see the smokestack of the locomotive just as it was passing; I don't think you could see the tops of the cars; I never remember seeing the tops of the cars; I noticed the top of the smokestack; this bridge rounded up just a little bit, high enough to let the trains pass under it. The cars did not reach to the top of the cut. There were four tracks in the cut and I should say it was about 50 feet wide, perhaps it might have been 60 feet. I never measured it. There was a change made, I think in 1894 or 1893.

They were building in the cut in 1893 and 1894 they com-
44 menced this wooden trestlework over this cut; stringers were put across, and uprights and pieces on the top on which to rest the rails for that temporary structure until they built this iron structure that they are running the trains on at the present time. First they built a wooden temporary trestlework structure. They ran trains on the temporary wooden trestle after they got it up; they had to move their trains above before they could build the piers in the centre of the cut on which to carry this iron structure,

I should say this trestlework was used a year or two, and in the meantime they were building the present structure.

It is admitted that trains began to be operated on the permanent structure February 16, 1897.

It is also admitted that the work of putting in the timber trestles, which was the first work relative to this change, was begun in May, 1894.

The present structure is an iron structure about 20 or 22 feet high, carries four tracks; I think it is 57 or 58 feet wide at our corner, and at the end of the building about 75 feet wide; I can tell you by looking at a memorandum I have (looking at memorandum).

In answer to DEFENDANTS' COUNSEL:

My son and myself made this measurement.

In answer to PLAINTIFF'S COUNSEL:

Q. Now state it?

A. It is 60 feet 10¼ inches, the width of the structure, outside measurement, at the corner of 123d street, and 75 feet 3½ inches at 100 feet 11 inches from the corner of 123d street, the end of our lot—that is the width of the structure there.

The structure widens as it goes north. It is about 22 feet
45 high, I think, and is supported by iron columns.

Q. Are there any of those columns in front of your premises?

A. Right at the corner there is a column, about half way down there is another, a little further down there is another one, there are three running across the street, but those are the ones facing my building; there is one about opposite the dining room, and the other one is just at the division line between our property and the property on 124th street in the rear. There are three similar columns at the other side of the structure; there are three on the east side of the street and three on the west side, opposite one another, and there are three in the centre. That makes nine columns in all in the street in front of my premises. I should say these columns are about 24 inches square. The base is much larger than that. The structure which is supported by these columns is built of iron or steel, and the railroad is operated there with four tracks; two centre tracks for express trains, the two outside tracks for local trains; the two tracks on our side are for the south-bound trains, and the two tracks on the other side are for the north-bound trains. The nearest station is between 125th and 126 streets.

Q. About how many trains pass the plaintiff's premises a day?

Objected to by defendants' counsel as incompetent, immaterial and irrelevant, and also on the ground that the plaintiff has already

shown by the documents put in evidence that the defendants have the right to operate their trains upon this structure.

Objection overruled. Exception to defendants.

A. I should say there were from 480 to 500 trains a day. I kept a count of it for some time.

46 Q. State what effects you have noticed from the operation of the trains on this structure, commencing with the effects of the operations of the trains originally there, before the change was made, and coming down to the present time?

Objected to by defendants' counsel as incompetent, irrelevant and immaterial, and too general in form, the question going to the operation of the trains on the four tracks.

Objection overruled. Exception to defendants.

A. During the time the wooden temporary structure was up there the noise was very great, so great that I lost a great many tenants through it, and the rents had to be reduced to keep what few tenants we had left; later on when they commenced to put up this iron structure they worked at that night and day, used electric lights there, and the hammering of iron made it like a boiler factory, something of that sort; people could not sleep, and there were complaints going on all the time about it—there was a reduction of rent all through the house to keep the tenants in.

Q. Come to the time when the operation of the present structure commenced and state — the effects of the operation of the trains on the present structure have been, what you have noticed in regard to noise, cinders and things of that sort?

Same objection, ruling and exception.

A. Since February, 1897, they have been running their trains on this iron structure, and we have noticed a great deal of noise, lots of smoke, quantities of cinders and dust in all the flats. I have seen the cinders fall and collected any quantity of them, and could collect a pailful at any time on the roof of the house, which is five stories high. I have had those cinders swept off or removed

47 from time to time. The inside of the area way I have swept every morning unless it happens to be a wet morning or Sunday morning, but it is swept nearly every morning; the window sills of the vacant flats are dusted off every morning. The next train that goes down will deposit a certain amount of them, and as the trains keep going the cinders keep collecting. If the window is open they come into the flat; I have picked them up in our own flat, and I have picked them up in the vacant flats. I have collected cinders and have brought them to court.

In answer to DEFENDANTS' COUNSEL:

I collected those cinders myself, and I saw the trains from which they dropped; they were on the tracks nearest the house and the ones next to it. I cannot tell the difference between those cinders

that dropped from the inside track and those from the outside track They are all alike.

In answer to PLAINTIFF'S COUNSEL:

Q. This white box containing cinders that you have produced, when were they collected?

A. They were collected on the 22d and 24th of April, 1900. The cinders in the dark box were collected on the 2d, 3d and 4th of May, 1900.

Plaintiff's counsel offered in evidence boxes of cinders.

Objected to by defendants' counsel as incompetent, irrelevant and immaterial, and on the ground he cannot identify the cinders which came from the trains running on the outside tracks and those on the inside tracks.

In answer to the COURT:

There was no other engines passing there except the engines of the New York Central and the New York and New Haven;
48 none others excepts those ran on those tracks. There was no fire around there of any building.

In answer to PLAINTIFF'S COUNSEL:

Some of these cinders are the size of a small hickory nut.

Boxes of cinders received in evidence and marked "Plaintiff's Exhibits R and S."

Exception to defendants.

The cinders now shown me were collected on the 25th of August, 1898.

Plaintiff's counsel offered box of cinders in evidence.

Same objection, ruling and exception.

Received and marked "Plaintiff's Exhibit T."

I have here five other boxes of cinders which were collected just about the same time as the last box, before the other trial, in 1898. I was a witness on the former trial of this action, and produced some of these cinders at that time, and they have been preserved since, including those I have collected myself this last month for this trial.

Q. Have you noticed anything in connection with the operation of trains at the station at 125th street so far as it affects your premises.

A. They stop all the express trains at that station but one or two, where formerly it was only local trains that stopped, and the starting of those trains jars our building very much indeed, as well as the depositing of those cinders, the smoke, making a great deal of noise, because those are heavy trains, eight, ten or twelve cars, heavy Wagner and Pullman cars. I refer now to trains being started from 125th Street station.

They come in there from the North and go to 42d street.
49 Of course the length of those trains puts the locomotives opposite our property in about the middle of the building, sometimes farther on, and after those trains arrive there and stop they don't seem to have steam enough to start immediately, and they are pounding away for some time to get that up, and that makes a great noise there and disturbs people. There is frequently a sort of process of firing up at 125th street, on the south bound trains especially; the trains going up do not fire up so much.

Q. With reference to the noise, state what effect you notice from the noise of passing trains, with reference to conversation, for instance?

Same objection, ruling and exception.

A. When holding a conversation with anybody in the dining-room or in the front room you have got to stop when those heavy trains pass; you can't hear one another speak. In 1892 and prior thereto, before the change was made, they did not stop express trains in 125th street—not as many—and of course there was not that noise opposite the building; there were only local trains that stopped at 125th street. As I noticed it at that time, it was not near so bad as it is at the present time; we did not get the smoke or the dust or the cinders. We could hear a rumbling, as if it was a wagon or something going past the place; that was all. We did not feel this jar or hear the noise that you do from this structure; we got very little smoke—none that I could remember of—and no cinders at all.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I think Mrs. Birrell bought this house in August, 1893, and the amount paid was $65,000, cash and trade. It was a farm in Mount Kisco, at about $27,000 or $25,000, and $2,500 in cash.
50 There were mortgages on this property at the time I bought it—a $32,500 mortgage to the Emigrant Industrial savings bank and $5,000 to the Coffin estate. There have been mortgages placed on it since. The $5,000 mortgage was paid off, and there was one for $2,700, I think it was, put on by Mrs. Birrell and myself; that was partly paid off, and there was one for $4,000 put on. Altogether $36,500 in mortgages on the property at the present time; $65,000 was the consideration money at the time of the purchase. The farm, I think, was put in at $25,000 or $27,000 and $2,500 in cash; there was a mortgage on that farm of $5,000; that was the furniture, implements and everything else on the farm. I commenced to live there June 30th, 1896. Prior to that time I had not been living on Park avenue, but had simply been there, going to and from this property.

I had been up there very frequently for a year. They were building previous to the time I went there to live. I used to pass through

there twice every day, when I came from Mount Kisco to New York. That was not all the opportunity I had of noticing the property; I used to get off at this property occasionally, and some time was there for an hour or two. That is all.

There was a bridge at 123d street when I bought the property, and you could not get across the avenue except by the bridges at 123d and 124th streets. The bridge at 123d street was the full width of the street; now the street is open all the way across, and paved in a way—very rocky pavement, I must say. The temporary wooden structure was put up there, and then the iron structure was put up over it, but I cannot tell whether trains ran on the wooden structure or not. When I made these measurements I have spoken about as to the permanent structure, my son and I made them from
51 the bottom of the structure; my son climbed up the column and held the tape, while I carried it across to the other side. We measured from the centre column to the other column—from the top to the bottom. My son is an assistant engineer, and knew pretty near what to do. I never measured the old cut. I know this permanent structure is outside of the lines of the old cut. Part of it, I know, is opposite our dining-room; the column that supports the structure opposite our dining-room was put there before the structure was built, and it is several feet this side of the cut; I could not say how many feet without measuring the thing.

The cinders in this black box are not all the cinders that fell during the three days I was collecting them; those are only the large ones. I could have collected pails full; I just selected a few samples. Some of them came out of New York Central trains and some out of the New York and New Haven; a great many came out of some of your big locomotives, some of them running on the local track and some on the express track. I could not tell the difference between cinders that fell from one engine and those that fell from another; I could not pick them out. I have seen firemen firing up a southbound train on leaving 125th street frequently; I saw it last night, firing up on a New York and New Haven train. I have seen firing up on a New York Central train; I saw it on the 30th of March, 1900, at 6 p. m., locomotive 820. They fired it up opposite this house, going through. That was on the outer track, an express train, the farthest east track—an express train on the local track.

During the time I was there I never got any cinders or smoke from the trains running in the old cut. You could see the smoke stacks as they passed along in the cut when you were standing on
52 the sidewalk. They threw out smoke but it did not come out that way and up the side of the building; before you had this structure built over the cut the cinders would strike and fall back into the cut during the time you are speaking of, and after I bought this property. There was a very low wall alongside that old structure, it might have been three feet high. Standing on the sidewalk you could see the smoke stack; the smoke stack was not over that wall, you could see the smoke stack of the locomotive as it passed

through the tunnel. Before the temporary wooden structure was put there I never had any complaint from the tenants about smoke or cinders coming into the building.

Re-direct examination—In answer to PLAINTIFF'S COUNSEL:

Q. As to the effects on the light by the passing trains; was there any effect on the light from that?

Same objection, ruling and exception.

A. Yes a great effect; if a train was passing when you were reading in the apartment, our apartment, or the apartment above, or the third apartment, when a train would pass on the local track you would have to stop reading, it darkens the place—in the day time it throws a shadow over what you are reading. It produces alternative flashes.

The local track I refer to, is the downtown track on the east side, the furthest easterly track.

In answer to DEFENDANTS' COUNSEL:

When a train is running on the centre southbound track the effect as to light is not as great as it is on the local track. It is farther away.

53 EDWARD H. PECK, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

My business is that of real estate agent. I know the particular boundaries of the premises in 123d street and Fourth avenue; I had charge of those premises from September, 1893 to July, 1896, as agent. During that period the premises were in fair condition, and we kept them in order.

NAPHTALI A. MILLHAUSER, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live at 101 East 123d street, in Mrs. Birrell's house. I have lived there close on to four years, occupying the second floor east, one flight up.

Q. State what effects of the operation of the railroad in front of these premises you have noticed as to smoke, cinders, dust, smell, noise, etc.

Same objection by defendants' counsel as made to the same question put to Mr. Birrell.

Objection overruled. Exception to defendants.

A. The interior of our apartment was in very good condition; the front room that I occupy as a sleeping room alongside of the parlor has been so jarred that the plaster has fallen down, and there are openings there from the jar of the trains.

Defendants' counsel moved to strike out that part as to jarring and vibration, on the ground that it is not part of the issues of this action.

Motion denied. Exception to defendants.

WITNESS: As to noise, it is simply awful, because trains
54 composed of eight, ten or twelve cars, sometimes more, stopping as they do principally in front of this property on the Fourth Avenue side from a point at 123d street back to the rear, are very heavy, and the locomotives have great trouble in starting, it is so bad you can't continue conversation, you must stop. There are any quantities of cinders, and the smell from the gas and smoke of course is worse than it ever was.

The light from the passing trains can hardly affect me because I am on the east, on the inside, I am not on the outer side. My windows face 123d street to the front, and the rear, there is a little alley way, a court, to one side of the property.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I mean to say that the noise is as great now as it was a year ago; I have noticed it particularly. I won't say the smoke is greater. I don't think it is any greater, but they seem to fire up, or whatever they do, they throw out an awful lot of smoke when they start from the corner, and put on a lot of coal, a fresh lot of coal. I get smoke in my flat, in both front and rear windows and sometimes in that little court around the corner. I have lived there close on to four years, but I don't know as that structure has been there all that time, I believe the temporary structure was there some little time—I don't think the road was operated on it when I first came there. When I first came there the road was operated in the cut. I have noticed a train running in the cut. I was then living in this house and previous to that a little farther down in the same street. When I was living in this house I never got any smoke and cinders when these trains were running in the cut.

55 ISABEL MCMARTIN, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I do not reside in Mrs. Birrell's house at present, but I formerly lived there, leaving there last October. I was formerly Miss Leaman. I think I first went to live in Mrs. Birrell's house in March, 1894; I occupied the second floor west.

Q. Did you notice any of the effects of the operation of the road while you were there, and if so, state what you observed?

Same objection by defendants' counsel.
Same ruling and exception.

A. The noise was very great, there were lots of cinders that used to come into the rooms; if the windows were open lots of smoke, disagreeable odors, and two ceilings fell while we lived there; also when the wash was hung out on the line and the fire-escape it turned the clothes all black. The noise I spoke of is the noise of passing trains. I noticed the vibration. In regard to the effect on the light by passing trains, if you were reading you would have to stop, because it would be darker, and it flickered so you could not see well. I lived on this avenue when the trains used to run in this cut, before they made the change. I don't think there was quite as much noise then, and there was not as many cinders, and not so much smoke, and, naturally, there was not the same effect on the light. The trains did not pass in sight of the premises. When trains passed there during the night we were disturbed, and the noise was certainly loud enough to interfere with sleep.

Q. I mean when you lived there until last fall?

A. Oh, yes; we noticed it just the same.

Q. Was the noise, when the trains were operated in the cut,
56 sufficiently great then to interfere with conversation or sleep?

A. Not so much; it would interfere somewhat, but after the trains went above you had to discontinue conversation, you could not hear what was said until the train went by. I mean after the trains were elevated on this viaduct. When they passed through the cut you would not have to dispense with conversation altogether, although it would interfere somewhat.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I was married last October, and I moved away from this house at the time I was married.

MARY J. FEGAN, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live at 31 West 16th street. I formerly lived in Mrs. Birrell's house.

My occupation is that of public-school teacher. I have been a teacher 18 years, in the city of New York. I think we went to Mrs. Birrell's house first, in the fall of 1894, and we left there in the fall of 1898. I remember when the railroad used to run in the cut, before they put it on the viaduct, and I remember how the trains used to be operated on the avenue then and the effects. I

have also noticed the effects of the operation of the railroad on the viaduct iron structure at the present time.

Q. State what you noticed about the operation of the railroad when you were living in Mrs. Birrell's house in 1898, on the present structure.

Same objection by defendants' counsel.

Objection overruled. Exception to defendants.

57 A. The noise was very loud. That was from the passing trains, and smoke and cinders annoyed us more; we were on the next to the top floor on the west side. We had several windows on Fourth avenue and the coal gas was very annoying. We got a great deal of that.

There was a smell; it had the effect of causing us to commence coughing. It was very disagreeable, and a great deal of the dust and cinders entered our windows; we could not put the bedding on the window sills at all without their becoming coated in no time with cinders and dust. We also noticed a great vibration in that building, and three of our ceilings fell during the time we occupied the flat, and one of the ceilings fell during the passage of a train. I remember that distinctly. I did not notice particularly the effect on the light by a passing train when I was sitting at the window; I think we were above the structure somewhat.

When the railroad was operated in the cut there was some noise, but I don't remember the smoke or gas or cinders annoyed us at that time. When the trains were operated in the cut the noise was not at all as great, not as it affected us in the least. I don't remember as there was any vibration at that time, I never noticed any. I occupied the fourth flat west and paid $30 when we left and $35 when we took the flat. We noticed a slight crack in a window pane after cinders struck it. Some of the cinders were remarkably large.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I live now in 16th street, but I did not move directly there from Mrs. Birrell's property; I used to live at 1900 Lexington avenue, and from there I moved to 16th street, where I live now.

58 There was considerable noise from the trains that passed on this structure when I lived there. I don't know whether there was more noise from the trains that ran on the tracks farther east or the track next to it. There were often several trains passing at once.

HENRY FISCHER, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mr. Birrell's house at the corner of 123d street and Park avenue, occupying the third floor inside—easterly side. I have occupied that flat about four years, I guess. It is more than four years since I went there, but I lived on the ground floor; it is about six years since I went into the building. I was there when the road was being operated in the cut.

Q. What have you noticed, with regard to the effect of the operation of the trains on the present structure, as to smoke, dust, cinders, noise and so on?

Same objection by defendants' counsel.
Objection overruled. Exception to defendants.

A. I have noticed since the tracks have been elevated that there is considerable more noise, and also we are troubled a good deal more with cinders than we were before the tracks were elevated, that is when they were depressed. At the present time, as the engines stop just about the end of the building and there is considerable more noise by letting off steam from the engines. I get some smoke, but there was not as much smoke when the trains were operated in the cut as at the present time. There is considerable more
59 noise since the present operation of trains than when they were operated in the cut. I noticed when the tracks were depressed that the noise then was less than at the present time.

Q. Have you noticed any vibration since the structure was elevated?

Objected to by defendants' counsel as not within the issues.
Objection overruled. Exception to defendants.

A. I have not.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I have noticed as much noise within the last year as I did before.

NORA REILLY, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mrs. Birrell's house, and have lived there since last August. I live on the top floor, west side, and I have noticed the operation of the trains going by. I am a little above the top of the trains as they go by.

Q. What have you noticed about the operation of trains?

Same objection by defendants' counsel.
Objection overruled. Exception to defendants.

A. I notice a noise very much, and foul air sometimes, and cinders, considerable cinders, sometimes worse than others; I do not notice any vibration, shaking, so much. I noticed the interference with the light; sometimes the smoke from the engine makes it.

60 Cross-examination—In answer to DEFENDANTS' COUNSEL:

I am on the top floor and I should say the trains run just about on a level with the floor under me.

This structure does not interfere with the light in my room; only when the smoke comes we notice the smoke occasionally, that is all.

FRANK G. SWARTWOUT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am a real estate broker and appraiser, and my office is in the Mt. Morris Bank building, corner of 125th street and Park avenue, in the borough of Manhattan, New York city. I have been in business as a real estate dealer in the city of New York, borough of Manhattan, over twenty years. During that time my operations have principally been in the upper part of New York city. I know the plaintiff's premises, 123d street and Park avenue, and have known them from the time they were built, which is about twenty years, I think. I have been familiar with the neighborhood during the time I have been in business and have bought and sold real estate in that neighborhood during that time. I have also attended to the letting of premises in that neighborhood during that time, and have appraised property extensively. I have conducted building operations myself within the last two years to the extent of several million dollars. I have the full numbers of the Real Estate Record and Guide from the first one that was ever published down to to-day, and I have been in the habit of consulting it frequently in the course of my business, in order to make myself familiar with what has been done in that business. I have attended

61 a great many auction sales of real estate, and have made it my business to keep myself informed of the fee and rental values in the city of New York, and especially in this neighborhood where the plaintiff's property is.

I have examined the plaintiff's property, with a view of testifying as an expert in this case. The last time I examined them was this morning, but I have examined them several times before. I was a witness on the former trial, a little over a year ago, and I examined them at that time and have since then. The premises consist of a five-story brick and stone apartment house, located on the northeasterly corner of 123d street and Park avenue, being a double flat with all the modern improvements—steam heat, hot water supply; the entrance is on 123d street. The improvements are bath-rooms,

hot and cold water, closet, steam heat, hot water supply—all the modern improvements. The premises are in fairly good repair, with the exception of cracks in the walls and chimneys and other parts of the premises. Standing on the roof, I could see the chimney shake when a train went by; that probably was the cause of the cracks.

I have noticed the vibration and the effect of the vibration upon the chimney and other parts of the building. As I stood on the roof the chimneys as the trains go by would shake, and you could feel the vibration under your feet standing on the roof, also in the house. In different parts of the premises, when large trains went by, I could feel the vibration.

In my opinion the value of these premises at the present time is about $36,000, house and land, $19,000 for the land and $17,000 for the building. The fee value of the same premises in 1892, before the change in the operation of the railroad, was $60,000,
62 $28,000 for the building and $32,000 for the land; in 1894 the value was $54,500, $25,500 for the land and $29,000 for the building. In February, 1897, the value was $38,000, $21,000 for the land and $17,000 for the building. In 1892 the rental value of the premises was about $4,500, in 1894 about $4,000, in 1897 about $3,400, and at the present time $3,300 to $3,400.

Comparing the course of valuation on Park avenue with Lexington and Madison avenues before 1892, there was very little difference in the course of values between these three avenues. If anything, Park avenue was better than the other avenues, built up more and it was more of a business avenue. The course of values on these three avenues for the ten years prior to 1892 had been upward to a certain extent. Up to that time Park avenue was always a little ahead of the other two avenues. Madison was the first avenue parallel to Park avenue on the west, and Lexington avenue is the first avenue parallel to Park avenue on the east. From 1892 to the present time the course of values on Park avenue between 116th street and the Harlem river had been downward, about 25 to 50 per cent. The course of values upon Lexington avenue between 116th street and the Harlem river from 1892 to the present time has been upward about 25 to 50 per cent. The course of values on Madison avenue during the same period or some part of it has been about the same as Lexington avenue, that is upward from 25 to 50 per cent. The course of values on the side streets from 116th street upward, say between Lexington and Madison avenues, has been upward to within about 300 feet of Park avenue. Within 300 feet of Park avenue it has been downward about 10 or 15 per cent. The course of values on the other parts of the side streets not within
63 300 feet, but further west and east respectively in that neighborhood, has been upward about 10 or 15 per cent.

Q. Has there been any existing fact which caused any difference in the course of value in those side streets between that part of the side streets within 300 feet of Park avenue and the remainder?

A. Yes, the construction of the railroad on Park avenue, the noise.

The operation of the road has made it very difficult to rent or sell property near the avenue. It has been difficult to rent or sell property on Park avenue for the last eight years. Prior to that time it was not.

I remember the building of the viaduct on Park avenue when it began and the course of building at that time. I saw it every day. I was familiar with what was done there and the effect of that upon the rents and values on that avenue.

Q. State what was done during that period in the construction of the road, how it began and what went on at this point.

A. First, they tore down the sections of the parapet wall above the street and made their excavations for their piers; next they put up wooden trusses to support the iron trusses; next they erected the iron structure which is now there. I am now testifying to what the defendants did at this point in the avenue. I think the work continued there about five years. The whole avenue was occupied, some parts of it was entirely blockaded. At this point near the plaintiff's premises there were a great many workmen engaged. There was little or no traffic on the street during the construction there. The effect of the carrying on of the work at that time was that you could not rent property; nobody wanted it.

Q. After this work was discontinued and the present structure was erected, what was the effect on rents then of that change, the discontinuance of that work and the operation of the present structure?

64

A. It was not any better.

The course of rental val-es on Park avenue since 1892, from 116th street to the Harlem river, has been downward, and on Madison and Lexington avenues during the same period the course of rental values has been upwards 5 to 10 per cent. The decrease in Park avenue has been from 25 to 50 per cent. On the cross streets the course of rental values 300 feet from Park avenue and going west and east as far as Madison and Lexington avenues, has, in some cases, increased and in some cases remained stationary. The increase has been 5 to 10 per cent.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I have not sold any property on Park avenue in the last eight years. Within the last eight years I have rented at 125th street and Park avenue, 126th street and Park avenue, 129th street, 120th street and 121st street and Park avenue. I rented at 126th street and Park avenue about two years ago. I am renting 129th street and Park avenue at the present time.

I gave the present value of this property at $36,000. I think it has depreciated about $1,000 in the last year. I testified on the former trial of this action.

Q. On the former trial was this question asked you, "What, in your opinion, is the fee value of these premises at the present time," and did you answer, "$38,000"?

A. I believe I did.

Q. Have you changed your opinion?

A. At that time, no, sir; I answered the same to-day, $38,000 in 1897.

There is a difference between $36,000 and $38,000 of
65 more than $1,000, but the premises are worth less to-day than they were at that time, the difference between 1897 and 1900. I don't remember the date of the former trial; it was a year or two ago. Property is on the decrease all the time in that vicinity. The value of a corner lot in that vicinity to-day is about $10,000 or $11,000. I say the value of this lot on which this building is situated to-day is about $19,000. The size of the lot is 35 by 100. The size of an ordinary lot is 25 by 100. I said the property on the side streets had decreased to within 300 feet of Park avenue.

Q. On the former trial of this case you were asked this question, "What has been the course of values on side streets in Harlem between 116th and 121st street and between Park and Lexington avenues from 1892 to the present time—fee values?" And did you answer, "They have increased up to within 200 feet of Park avenue." Have you changed your mind?

A. Within 200 or 300 feet.

Q. You answered 300 feet. Do you wish to change your answer?

A. No. To-day I believe it is 300 feet—from the experience I have had the last year, I can increase it. It has changed within the last year.

I know the property at 103, 105 and 107 East 123d street. They are adjoining this property in suit. I do not know what they rent for. I know there have been some sales of this property, but I have forgotten what they were. These houses are not exactly the same as this property of Mrs. Birrell. Those are inside houses, and this is a corner house. The difference is Mrs. Birrill's has a steam-apparatus and steam-heating plant, which did supply all the other houses, and in that way it was constructed somewhat different. They
66 have the same number of rooms, except one apartment in Mrs. Birrill's.

Q. On account of the vestibule?

A. I don't remember what the cause of it was, but there is some little difference.

I know the property at the southwest corner of 124th street and Lexington avenue well. It is a five-story apartment house and stores. That property has not been recently sold. I have had charge of that property ever since I sold the land and building. The flats in that building to-day rent for $35, $28 and $40, and they rented for the same five years ago. There has been no change in the rent, except the stores. I do not know that there has been any depreciation in the value of that property. My books will show the

rents right along from year to year, and it shows an increase in the stores. About five years ago the corner store rented for $1,200, to-day it is $1,500, and is occupied by Hendrickson, the druggist. I think he has been there about five years.

I know the property at the southwest corner of 129th street and Lexington avenue by passing by. It is a five-story apartment house and stores. I had it for sale two or three years ago for about $80,000, but I did not sell it. I know nothing about the rents of that property; don't know whether they have appreciated or depreciated.

I know the property at the northeast corner of 121st street and Lexington avenue by passing it. It is a five-story apartment house and stores, but I do not know whether there have been any sales of that property recently, nor do I know the rental value of the property.

I know the property at the northeast corner of 123d street and Lexington avenue. That is a five-story apartment house and stores.

I do not think any sales of that property have been made re-
67 cently, not within the last seven or eight or ten years. I do not know what the rental value of those flats are. They have always rented well, but I do not know what they rent for.

I know the property at the northeast corner of 117th street and Lexington avenue. It is a five-story apartment house, but I do not know what the rental values are, nor whether they have appreciated or depreciated within the last five years. I know the property by passing it only. I had it for sale from the man that built it at the time, but I did not sell it.

I know the property at the northeast corner of 124th street and Madison avenue, but I do not know anything about the rental value of that property to-day.

The value of this property in suit in February, 1897, was $38,000, and I think it depreciated between February, 1897, and January, 1899. I don't remember that I said on the beginning of the cross-examination that this property was worth $38,000 in January, 1899. I say it was worth about $37,000; I consider it depreciates about $1,000 per year.

Re-direct examination—In answer to PLAINTIFF'S COUNSEL:

The rental value of the apartment occupied by Mr. Birrell is about $25 per month.

Plaintiff rests.

Defendants' counsel moved to dismiss the complaint on the following grounds:

I. That the plaintiff has failed to show that under the street opening proceedings commenced in 1850 and consummated in 1853
under the acts of the legislature, and subject to the municipal
68 ordinances, resolutions and agreements then in force in respect to this avenue, any easements or property rights appur-

tenant to the premises described in the complaint have been taken, abridged or interfered with by the direction or maintenance of the structure complained of, and the operation of trains thereon.

II. That the plaintiff has failed to show any substantial pecuniary damage to the fee or rental value of the premises described in the complaint arising from the acts of the defendants, or either of them.

III. That the plaintiff has failed to show any injury to the fee or rental value of the premises described in the complaint by reason of so much of the viaduct structure as lies outside of the strip of land along the centre of Park avenue, about 60 feet in width, devoted exclusively by chapter 702 of the Laws of 1872 and for more than 20 years prior to the commencement of this action, to and used under said act exclusively for railroad purposes.

IV. That the plaintiff has failed to show any injury to the fee or rental value of the premises described in the complaint by reason of so much of the viaduct structure as lies outside the strip of land, 24 feet in width along the centre of Park avenue occupied by the defendant, The New York and Harlem Railroad Company, by condemnation proceedings taken pursuant to chapter 263 of the Laws of 1871 against Samson Adolphus Benson, and thereafter for more than 20 years prior to the commencement of this action used exclusively for railroad purposes.

69 V. That the only damage to the premises in suit, if any, shown is inconvenience to the occupants thereof, and resulted from the acts of the board for the Park Avenue improvement above 106th street, for which neither of the defendants is liable.

VI. That any additional interference with the light and air of plaintiff's premises caused by the elevation of the tracks over which the defendants' trains are operated is offset by additional facilities of access to said premises resulting from the completion of the improvement and the throwing open of Park avenue from curb to curb as a public street.

VII. That any loss, if any, in the rental value of the plaintiff's premises has been offset by the benefit to the premises for business purposes arising from the completion of the Park Avenue improvement and the opening of a new station at 125th street.

VIII. That neither of the defendants is liable for any damage caused by the operation of their trains pursuant to legislative mandate upon the structure provided by the legislature of the State of New York and the municipality of the city of New York.

IX. That the only damage, if any, to the fee or rental value of plaintiff's premises from the operation of trains on the new structure is by reason of the additional noise over and above the noise formerly arising from any operation of trains in the cut is caused solely by the new structure designed by the State and municipality of New York.

X. That the only damage, if any, shown as likely to result
70 to the fee or rental value of the plaintiff's premises from the future maintenance of the viaduct structure complained of,

and the operation of trains thereon, is the noise which will arise only from the lawful running and operation of the defendants' trains, for which the plaintiff can have no recovery.

XI. That the plaintiff has an adequate remedy at law for any relief to which she is legally entitled.

XII. That the plaintiff has failed to prove any substantial impairment of the easements of light, air and access, or either thereof, or any damage to the premises caused by the maintenance and operation of defendants' road upon that part of the viaduct which extends beyond the centre 24-foot strip, apart from the operation of the road upon the centre twenty-four feet.

As to the defendant, The New York and Harlem Railroad Company, on the ground that no act of any kind has been shown to have been done by that defendant.

Motion denied; exception to each defendant on each ground.

It is stipulated that the work of constructing the elevated railroad on Park avenue was performed by the board for the Park Avenue improvement appointed pursuant to the statutes of 1892 and 1894, and in conformity with the terms of those statutes.

Defendants' counsel offered in evidence chapter 263 of the Laws of 1831.

Defendants' counsel offered in evidence final decree made by the court of chancery in condemnation proceedings instituted by the New York and Harlem Railroad Company to secure title to a
71 strip of land 24 feet in width along the centre line of Fourth avenue and opposite the premises in suit.

Received and marked "Defendants' Ex. 2." (Printed in appendix.)

Defendants' counsel offered in evidence map filed in the office of the register of the city and county of New York, October 22d, 1831, locating the route of the railroad of the New York and Harlem Railroad Company, with the resolution of the common council of New York on October 11th, 1831.

Received and marked "Defendants' Ex. 3." (Printed in appendix.)

Also ordinance approved by the mayor of New York, December 22d, 1831, and incorporated in the covenants of the New York and Harlem Railroad Company with the mayor, aldermen and commonalty of the city of New York, dated January 9th, 1832.

Received and marked "Defendants' Ex. 4." (Printed in appendix.)

Also the award of benefit and damage against premises abutting on the easterly side of Fourth avenue between 123d and 124th streets, including the premises described in the complaint, in proceedings taken by the mayor, aldermen and commonalty of the city of New York, to open Fourth avenue as a street 140 feet wide from 38th street northerly.

Received and marked "Defendants' Ex. No. 5." (Printed in appendix as Plaintiff's Exhibit H.)

Also chapter 702, Laws of 1872.
Also chapter 339, Laws of 1892.
Also chapter 548, Laws of 1894.
72 Also chapter 594, Laws of 1896.
Also chapter 143, Laws of 1848.
Also chapter 907 of the Acts of Congress of 1890.
Also chapter 613 of the Laws of 1898.
Also lease dated April 1st, 1873, made by the New York and Harlem Railroad Company to the New York Central and Hudson River Railroad Company for the term of 401 years.
Received and marked "Defendants' Ex. No. 12."
Also agreement made between the city of New York and the railroad company, dated January 9th, 1832.
Received and marked "Defendants' Ex. 13." (Printed in appendix.)
Also photograph of the premises in suit taken December 12th, 1898, at 11 o'clock a. m., looking northeast.
Received and marked "Defendants' Ex. 14."
Also photograph looking under the structure on Park avenue, looking south, taken October 13th, 1898, showing the premises in suit.
Received and marked "Defendants' Ex. 15."

CHARLES H. CHAMBERS, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at White Plains, New York. I am assistant auditor of the New York Central and Hudson River Railroad Company, and as such assistant auditor I have charge of the disbursements made on account of the Park Avenue improvement. I have not in
73 my charge the documents showing the expenditures made under the improvement of 1872. The papers showing the expenditures made on Park avenue under the laws of 1872 are in the treasurer's department. I have a memorandum here of the amount that the improvement of 1872 cost; it was $6,482,576.86. The present improvement under the laws of 1892 cost to March 1st of the present year, $3,893,930.22; that takes the entire structure from 106th street to 149th street. Part of that was north of the Harlem river, and north of the Harlem river the railroad company paid all the expenditures, but south of the Harlem river it did not. The proportion paid by the city was $773,531.95, and the balance was paid by the railroad company. I have the figures here of the amount the improvement cost south of the Harlem river to 149th street. It was $2,244,165.97. North of the Harlem river there are two items, the bridge and the viaduct structure; the bridge cost $812,031.91 and the viaduct north of the bridge to 149th street $269,622.64.

JOSEPH H. FRANKLIN, called as a witness for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 14 East 125th street. I am manager of the Grand Central station and of the Harlem line, and have been such manager since 1892. I have been employed on the New Haven road and the New York Central since 1851. I was familiar with the operations of the trains along Park avenue during that period to the present time. Prior to 1872 the trains operated in Park avenue at 123d street ran on the surface. About 1874 they went down into
74 the cut in front of 123d street. Now they run on the viaduct structure, on which there are four tracks; it is ballasted with stone ballast.

I am familiar with the number of trains run a day over that structure. The two easterly tracks are the south-bound tracks, the two westerly tracks are the north-bound tracks. We run most of the local trains on the two outside tracks; the trains that stop at 110th street, for instance, they have got to run on the outside tracks and the express trains run on the two centre tracks, and sometimes on the other tracks. I think about 75 per cent. of the express trains run on the two centre tracks. The local trains average about four cars. The express trains will average six or seven cars. The number of trains run over this structure a day, north and south, varies a little—there are about 475 to 480 a day; we call an engine a train, or anything that runs over the line. That includes everything that runs over the structure.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

I don't think the length of the cars will average 65 feet, they will average about 62½ feet—they run from 50 to 70 feet. I think the average weight of a locomotive on an express train would be about 90 tons, and on the local trains I don't think they will go over 70 tons.

This track was ballasted about a year ago; in 1899. Prior to 1872 the road ran along the surface from 42d street to across the Harlem river, all the way on the surface. In 1872 this cut was constructed. It began at 42th street and extended to the Harlem river, all the way in the cut. The depth of that cut at 123d street was about 15 feet. I do not know how many trains run on the outside
75 tracks, probably 35 to 40 per cent. Two tracks would not accommodate all of our traffic on the road there.

Re-direct examination—In answer to DEFENDANTS' COUNSEL:

There are about as many trains north-bound as south-bound. The locomotives running over the structure burn hard coal and some burn soft coal; the engines that burn soft coal are provided

with coke to burn to carry them out to the city limits. They do not burn soft coal on the structure, they burn coke. The firemen are prohibited from doing any firing on this structure, and we think they always obey. I have known of instances of men disobeying orders of that kind, but they got reprimanded very severely summarily. I keep a watch for that purpose to find out if they do.

EZRA P. NAYLOR, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at Yonkers and my business is that of civil engineer and railroad engineer. I am in the employ of the New York Central and Hudson River Railroad Company, and have been in their employment since 1887. From 1887 to 1892 I was in the employ of the New York Central Railroad Company, and from 1892 to 1898 in the employ of the board for the Park Avenue improvement.

I was familiar with the depressed cut in front of the premises at 123d street and Park avenue, and I am familiar with the structure as it is now. The depth of that old cut at this point was about 15 feet below the pavement on Park avenue, and there was a parapet wall there about 2 feet 6 inches high. The width of the de-
76 pressed cut at the bottom was 50 and at the top 52 feet. The present iron structure at this point varies in width, at the north line of this property it is 75 feet 3½ inches from out to out; at the south line it is 60 feet 10¾ inches from out to out. The height of the structure at this point is 14 feet 4¼ inches to the bottom of the girder, and the girder is 7 feet 4¼ inches deep. That would make a total of 21 feet 9 inches, and that is the height of the structure. That is not the height of the rail, it is the height of the top of the girder, the rail is 20 feet 5 and ¼ inches above the pavement. There are four tracks on this structure, and the whole structure is within the old 100-feet line of the avenue.

I am familiar with the original 24-foot strip acquired by the railroad company; the two centre tracks upon the viaduct structure are within the 24-foot strip.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

There are two outer tracks outside of that, both of them are entirely outside the 24-foot strip.

In answer to the COURT:

The centre strip is occupied by two tracks and the other two tracks are on the outer sides of that strip. Two of those tracks cover that strip, one is north-bound and the other is south-bound. There are two other tracks, one is on the east side of the strip, and the other is on the west side of the strip.

In answer to PLAINTIFF'S COUNSEL:

The two centre tracks are within the 24-foot strip and the outside tracks, each of them is outside of the 24-foot strip. The width of the structure at the southerly line of the plaintiff's premises
77 is 60 feet 10 and ¾ inches. There are 18 feet 5 and ⅜ inches of the structure east of the 24-foot strip at this point and the same westerly. The width of the structure at the northerly line of the plaintiff's premises is 75 feet 3½ inches, and there are 25 feet 7¾ inches east of the 24-foot strip and the same west.

Q. (Referring to diagram.) What is the distance between the easterly rail of the westerly south-bound tracks on the lines of the 24-foot strip?

A. The rail is about a foot and half inside of the 24-foot strip.

Q. What is the distance required for the safe operation of cars 70 feet long outside of the centre of the rail?

A. It don't make any difference about the length of the cars.

The width of an ordinary car is about nine feet. The cars hang over the rail about two feet. When a car is running on that southerly or westerly south-bound track, I think about six inches of it overhangs part of the street outside of the 24-feet strip.

Q. Then it is not possible to operate the two centre track of this railroad as they are at present constructed within the limits of the 24-foot strip.

Objected to by defendants' counsel as calling for a conclusion.

Objection overruled. Exception to defendants.

A. It is possible to operate the two tracks of the railroad within the 24-foot strip.

As the two centre tracks at the present day are operated they extend over the 24-foot strip about six inches on each side. The tracks are spaced more than the normal spacing.

The station at 125th street is under the tracks; the platform is between the tracks, the two easterly and westerly tracks. At no time was the platform outside of the tracks entirely; we never built the platform there in that way.

78 Q. Where do the tracks begin to spread to get on either side of the platform?

A. The two centre tracks run straight.

There is a curve in the two outer tracks; it is indicated on the drawing. With reference to the plaintiff's property, the curve of the two outer tracks begins at the north line of 123d street, and extends to about the south line of 124th street.

Q. What is the reason for that curve?

Objected to by defendants' counsel as incompetent, irrelevant and immaterial.

Objection overruled. Exception to defendants.

A. To spread the tracks so as so allow a space for the platform.

Q. The platform, as far as the two outer tracks are concerned, might have been placed outside the whole tracks, might it not?

Objected to by defendants' counsel as incompetent, irrelevant and immaterial.

By the COURT: Not what might have been done; we are talking about what was done. The map is in evidence, I suppose, and shows exactly the location of the station and the width of the structure.

DEFENDANTS' COUNSEL: This is a map entitled "Elevation east side." Section AA shows under the act of 1892, in dotted lines, the former depressed roadbed, and the present viaduct structure with relation to its distance from the east building line at Park avenue at 123d street, showing under the act of 1892 the south end of the platforms of the station at 125th street. We offer this map in evidence.

Received and marked "Defendants' Ex. 16." (Printed in appendix.)

A change has been made in the ballast of this structure
79 within the last year or two. The rails have been taken off of their bearings on the iron structure, and are now resting on wooden ties, with stone ballast underneath the ties. That work was done in the fall and winter of 1899. It commenced at the end of June, 1899, and was completed in January, 1900.

From my knowledge and experience as an engineer, I can say that the effect of that ballast upon the sound of trains going over the structure will be to very much lessen it.

WALTER KATTE, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 523 Madison avenue, and my occupation is that of civil engineer. I have been a civil engineer between forty and fifty years. I was chief engineer of the New York Central and Hudson River Railroad Company from 1885 to May, 1898. I was familiar with the act of Congress requiring the bridges over the Harlem river to be raised. As chief engineer of the New York Central and Hudson River Railroad Company I prepared a plan elevating the tracks of the New York Central to conform to the act of Congress. The elevation commenced at 125th street. That plan was not adopted. I did not make an amended plan until after the inauguration of the board of commissioners of the Park Avenue improvement. That was under the act of 1892, and I was one of the commissioners and superintending engineer. As superintending engineer I prepared the plan, in conformity with the act of chapter 339 of the Laws of 1892, I think it is, for the elevation of the tracks. The plan prepared by the commissioners was adopted. The first plan was the one
80 I spoke of as being in accordance with the act of Congress; that the commissioners had nothing at all to do with. The

commissioners' plan of 1892, prepared by me under their direction, was adopted.

Q. Was that plan amended?

A. That is the amended plan, between 111th and 115th streets, that was adopted; that is under another act.

The plan I prepared under the act of Congress was entirely sufficient for all railroad purposes.

Q. Why was that changed?

A. It can hardly be said to have been changed because it was never adopted for the reason that the act of the legislature passed authorizing it was never signed by the governor; the whole thing fell through—that is under that plan.

LORENZO S. PALMER, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 35 West 132d street. My business is that of real estate broker and appraiser. My office is in the Twelfth Ward Bank building, 147 East 125th street. I have been a real estate broker and appraiser sixteen years, and during that period I have bought and sold property in Harlem. My business has been principally in Harlem, and I have appraised and rented property in Harlem, such as private houses, dwelling houses, apartment houses, and everything pertaining to real estate, both vacant and improved.

I am familiar with this property at the northeast corner of 123d street and Park avenue. I have examined it; the last time being last Sunday of this week. The present value of that property today is $40,683; $21,000 for the lot and $19,683 for the
81 building. In 1892 the property was worth $48,000; $21,000 for the lot and $27,000 for the building. In 1894 it was worth $45,300; $21,000 for the lot and $24,300 for the building. In the early part of 1897 it was worth about $40,683, about the same as it is today. There has been no change between that time and today. The value of a vacant lot 25 by 100 in that locality today is $18,000. As to a lot 35 x 100, it would be about $25,000. It makes a difference in the value of property in that locality if there is a building on it of this description.

I should say this building was built about 1883. Since that time a great many apartment houses of this description have been built in Harlem. This is not a strictly modern house.

I am familiar with the course of values of property both fee and rental on Madison avenue since 1892. The course of values of property of this character on Madison avenue since 1892, between 116th and 120th streets, has appreciated 15 to 20 per cent. North of 120th street it is about stationary.

I am familiar with the course of values in Lexington avenue in this locality within the last 8 years. The course of values there has

been about stationary. Lexington avenue was built up in 1892. I am familiar with the rental value of this property at 123d street and Park avenue today, and its rental value today is $3,870. That is between 9 and 10 per cent. on the valuation. The course of values on Park avenue within the last ten years has been stationary. The rental value has been a little lower, possibly a depreciation of 10 per cent.; the fee value has been stationary. The reasons why the rental value has been lower are that there has been a general depreciation throughout the city, what they call the commercial
82 panic of 1893, 1894 and 1895 had a tendency to depreciate rents all over. I doubt if a complete recovery has been made from that year, it is still feeling the effects of it.

In answer to the COURT:

Generally all over, not more particularly there—it is the same all over, and that effect has not been finally removed, I think.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

In computing the fee value of this property I took the rental value into consideration to some extent. I say the rental value today is $3,870. In computing the fee value I assume that to be the rental value, so my fee value is based on the rental value to some extent. That is an important factor in determining the value of property. Among the causes for the depreciation of rental values on Park avenue I do not necessarily take into consideration the operation of this railroad. I don't consider that the operation of this railroad with its attendant incidents of noise, smoke, dust and cinders, and so on, has any more effect on the rental value of the property than it ever had.

By the COURT:

Q. Has it any effect at all?
A. No, sir.

By the COURT:

Q. Do I understand you to say that the noise of a railroad running close up against a building occupied as a dwelling, and the escape of steam, gas and cinders does not affect the value of that property?

A. Most assuredly it does. But my reason for answering as I did is that this has always been a railroad, any houses that were built there were built under the conditions that existed at that
83 time, and exist to-day—the same conditions exist to-day that did then, therefore the course of rents would remain the same as they did ten years ago.

In answer to PLAINTIFF'S COUNSEL:

I say it does not affect the value of the property to have the operation of the railroad there any more than it did ten years ago.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Q. I ask you if the operation of this railroad, with the smoke, dust, cinders, and so on, as have been described, affects the value of the property?

A. It affects the sale of property there surely. It is not as salable as it would be if it were not there.

By the COURT:

Q. Do you mean to tell me if that railroad was not there that property would not be worth more than it is to-day?

A. Surely it would.

It affects it unfavorably, and makes it more difficult to rent property on the avenue to some extent, I guess.

In answer to DEFENDANTS' COUNSEL:

Those conditions have always obtained there.

Defendants' counsel moved to strike out the testimony of the witnesses Birrell, Peck, Milhauser, McMartin, Fegan, Fincke and Reilly as to the noise, and the smoke, cinders, gas emitted from trains operated upon the structure, on the ground that they have, in their evidence, made no differentiation between trains operated on the outside tracks and those operated on the inside tracks.

Motion denied. Exception to defendants.

Defendants' counsel renewed his motion to dismiss the complaint on all the grounds stated at the close of the plaintiff's case.

84 The exhibits herein not printed in this case on appeal may be produced and used by either party on the argument of any appeal herein with the same force and effect as if so printed. In the event of their non-production they shall be deemed to be sufficiently described in the record.

The foregoing case on appeal contains all the evidence, exceptions and proceedings taken and had upon the trial of the above action.

(Here follow maps marked pp. 85 and 86.)

87 DEFENDANTS' EXHIBIT 2.

Abstract of the papers filed in the proceeding instituted by the New York and Harlem Railroad Company to acquire lands of Samson Adolphus Benson, an infant, and others, introduced in evidence by plaintiff in the foregoing case upon appeal.

(1.) On the 6th day of April, 1832, the New York and Harlem Railroad Company filed its petition in the office of the vice-chancellor of the first circuit in the city of New York, verified the 3d day of April, 1832. The said petition recites the provisions of chapter 263 of the Laws of 1831, incorporating the New York and Harlem Railroad Company, and that the said railroad company, in pursuance of the provisions of said act had located the route of its railroad or way in the centre of the Fourth avenue from the Harlem river to the north side of 23d street, and duly filed the map thereof in the register's office of the city and county of New York, with approval of the same by joint resolution of the common council of the city of New York, together with the certificate of the directors under their hands and seals designating the line, course or way of said railroad. The petition then recites the provisions of the eighth and ninth sections of said act relating to the acquisition of such lands or real estate as may be indispensable for the construction or maintenance of a single or double track railroad or ways. The petition shows that since the approval by the common council of the
88 maps showing the route of said railroad, the mayor, aldermen and commonalty of the city of New York gave their consent and authority to the petitioners to construct their said railroad or way along the centre of Fourth avenue from the Harlem river to the north side of 23d street, and "that for the purpose of constructing their single or double railroad or ways, and in order to keep the line, course, road or way thereof, your petitioners were required to be seized and possessed of the fee simple of the following lands and real estate, namely: 1st. All that certain piece of land bounded westerly by a line drawn parallel to the westerly side of the Fourth avenue on the easterly side thereof at the distance of thirty-eight feet therefrom; easterly by a line drawn parallel to the westerly side of the Fourth avenue at the distance of sixty-two feet therefrom; northerly by an old road leading from Harlem to King's bridge; and southerly by lands of Peter Poillon, being about seven hundred and eighty feet in length on each side by about twenty-four feet wide. And your petitioners shew unto your honor that the fee of the said estate is in one Samson Adolphus Benson, an infant, under the age of fourteen years."

After describing other parcels of property acquired in said proceedings, but not material here, the petition states: "And your petitioners further shew unto your honor that they offered to purchase

the fee of the second (2nd) third (3rd) fourth (4th) and sixth (6th) described pieces of land and real estate of the several owners thereof; and they offered to purchase the fee of the piece of land and real estate firstly and fifthly described; but your petitioners and the owners and the guardians of the infant owners have disagreed as to price.

And your petitioners further shew that said offer and said
89 disagreement of price took place prior to the making of any map of the said road upon the said lands and real estate."

The prayer for relief asks that the court cause such notice to be given to the parties interested, etc., as shall be deemed proper and sufficient, and that upon the return of said notice the court direct the manner of ascertaining the damages which the several owners of the said lands and real estate will sustain by the occupation thereof by the petitioners, and further asks the court to appoint three competent and disinterested commissioners who will make appraisements and report their examination of the premises and their awards to the court which increase or diminish the damages awarded in case the court should be satisfied injustice has been done. The final portion of the prayer for relief is as follows:

"And your petitioners also pray that your honor will direct as to the several amounts of damages and make an order or decree (in due time) particularly describing the amounts and reciting each appraisement of damages and the mode of making the same and other facts necessary to a compliance with the eighth section of the said act, entitled An act to incorporate the New York and Harlem Railroad Company; and so that when the said order or decree shall be recorded in the office of the register of the city and county of New York your petitioners shall and may be seized and possessed of the fee simple of all such lands and real estate and may enter upon, take and use all the same for the purpose of said road; and for such further order in the premises as your honor may grant. And, &c."

90 Isaac Adriance appears as solicitor for the petitioners.

(2.) On the 6th day of April, 1832, an order was directed to be entered by William T. McCoun, Esq., vice-chancellor; said order is entitled "In the matter of the petition of the New York and Harlem Railroad Company in relation to certain lands required to be entered upon and taken possession of for the use of said company." Said order recites the petition filed by said petitioners, and directs that the time and place of hearing of the parties interested in the said petition shall be Tuesday, the 24th of April, 1832, and that fourteen days before said time of hearing a copy of this order and the petition shall be served upon Samson Adolphus Benson and others named in the petition as parties interested in the lands therein mentioned.

(3.) On the 27th day of April, 1832, a copy of said petition and of said order, together with the affidavit thereto attached of Pierre E. T. McDonald, to the effect that he served a copy of said original peti-

tion and order on Samson Adolphus Benson and others on the 7th day of April, 1832, was filed.

(4.) On the 27th day of April, 1832, an order was filed and entered upon the direction of William T. McCoun, Esq., vice-chancellor, reciting the original filing and the affidavit of service, &c., of said petition and order, and appointing John Leonard, Charles Oakley and John B. Thorpe, all of them being freeholders as well as residents in the city of New York, commissioners to make appraisement and determine the damages which the respective owners thereinafter mentioned of the lands thereinafter described will sustain by the occupation thereof in fee for the purpose of the said railroad;

91 "that said commissioners make appraisal and determine the damages which Samson Adolphus Benson will sustain by the said New York and Harlem Railroad Company, in taking in fee," etc. (Here follows a description in identical terms with that contained in the original petition of a strip of land 24 feet in width then owned by Samson Adolphus Benson.)

The order further directs that said commissioners be notified of their appointment and be required to name a day for meeting on the lands to view the premises required to be taken and directing them afterwards to convene at some suitable place by them appointed for the purpose of proceeding with the performance of the duties thereby required of them, and further providing that the said commissioners should cause at least 10 days notice to the owners of the said lands of the time for viewing the premises, and of the time and place of meeting so appointed by the commissioners, and further requiring each of the commissioners to take and subscribe in writing before said vice chancellor an oath or affirmation to fully perform the duties of the office of commissioner of appraisal according to the best of his ability, etc., and further requiring the said commissioners after viewing the premises, and without favor or partiality to appraise or determine the damages sustained by the respective owners and claimants of the said lands and real estate, and further requiring them to report the same in writing to the said vice chancellor, &c., with all convenient speed, "and so that their said report shall contain a minute and accurate description of the lands appraised, and may contain any other matter which the said commissioners may consider explanatory, necessary or desirable."

"And it is further ordered that * * * Benjamin L.

92 Benson be and he is hereby appointed to appear before the said commissioners to act in and on behalf of the said Samson Adolphus Benson, an infant, * * * and all further directions are reserved until the coming in of the report of said commissioners."

(5.) On the 16th day of July, 1832, the said commissioners filed their report reciting the order appointing them and the notice given to parties interested of the meeting of said commissioners as required in said order. "The commissioners named therein report that they have made appraisement and determined the damages which Samson Adolphus Benson will sustain by the New York and Harlem

Railroad Company occupying and taking in fee the lands set forth in said order of the vice chancellor, seven hundred and eighty feet long on each side by twenty-four feet in width upon the westerly side of a line drawn parallel to the westerly side of the Fourth avenue on the easterly side thereof, at the distance of thirty-eight feet therefrom; easterly by a line drawn parallel to the westerly side of the Fourth avenue at the distance of sixty-two feet therefrom; northerly by an old road leading from Harlem to King's Bridge, and southerly by lands of Peter Poillon; that Benjamin L. Benson appeared before us and acted in behalf and for account of the said Samson Adolphus Benson, an infant; that said Benjamin L. Benson and Isaac Adriance are the guardians of said infant; that said lands were leased to Leonard and Amos Jones two years, but which lease will expire the first day of April, 1832, subject to a ground rent of $3.23 per acre; that we award to Samson Adolphus Benson the sum of $104.68 for the fee of the land aforesaid, and to Leonard and Amos Jones the sum of $2.78 for their sole interest in the lands aforesaid."

93 (6.) On the 16th day of July, 1832, an order in said proceedings was duly filed and entered by direction of William T. McCoun, Esq., vice-chanceller, &c., reciting the filing of a report of said commissioners appraising and determining the damages that Samson Adolphus Benson and others will sustain by the occupation by the said The New York and Harlem Railroad Company in fee of certain lands, hereditaments and premises described in the petition of the New York and Harlem Railroad Company heretofore presented to the vice-chancellor. Said order directs that all the parties interested appear before the vice-chancellor on Monday, the 30th day of July, 1832, "when the said report of the said commissioners will be examined, and the said objections be heard in relation thereto, and the damages increased or diminished, providing that said vice-chancellor shall then and there be satisfied that injustice has been done," and further directs that all such parties who shall claim or do intend to claim an increase of the said damages, do furnish the vice-chancellor with their objections in writing, to the said report, and the grounds upon which they claim such increase and the amounts thereof, on or before the time above mentioned, and said order further directs that copies thereof should be published as notice to the parties interested, in three of the public newspapers in the city of New York, daily for 10 days at least.

(7.) On the 30th day of July, 1832, affidavits were duly filed, to wit: Of Edward S. Howard, to the effect that the said notice directed to be given in the order last above mentioned, had been regularly published in the New York Morning Courier and Enquirer daily for 10 days successively, commencing on the 18th day of July

94 last past, by Cornelius B. Marshall, to the effect that said notice had been published in the New York Advertiser and Journal for 10 days in succession, and by James Gill, to the effect that said notice had been published in the New York Evening Post,

daily for 10 days (Sabbath days excepted), commencing on the 17th day of July, 1832.

(8.) On the 26th day of October, 1832, an order was filed by the direction of William T. McCoun, Esq., vice-chancellor, &c., reciting the filing of the report of said commissioners of appraisal, determining the damages which Samson Adolphus Benson and others would sustain by the occupation by the said The New York and Harlem Railroad Company in fee of certain lands, hereditaments and premises described in the petition of the said The New York and Harlem Railroad Company, heretofore presented to the said vice-chancellor, and reciting that it appears that the said commissioners have made appraisal and determined the damages which Samson Adolphus Benson would sustain by the petitioners occupying and taking in fee the lands set forth in said order as belonging to him, an amount or sum of $104.68, and that Leonard and Amos Jones having a lease of the lands, 2 years of which is expired from the first of April, 1832, subject to a ground rent of $3.23 per acre, and that the said commissioners award to said lessees for their damages the sum of $2.78.

Said order further recites the order above mentioned, giving notice of hearing by the vice-chancellor of the parties interested and reciting the order of publication, and recites that said vice-chancellor has examined the said report of said commissioners of appraisement, and that no objections had been made to the same by any of the parties aforesaid except William Wilson, and the vice-chan-
95 cellor having increased the award to said William Wilson, the said report was as above modified, and everything therein contained, does ratify and confirm. "And it is further ordered that the said petitioners offer to the owners aforesaid the sums awarded to them, or deposit the same to the credit of said owners in the bank of the New York Chemical Manufacturing Company."

(9.) On the 28th day of December, 1832, certain receipts of the sum awarded by commissioners and approved by the court were filed among others, the following:

"New York, 26 Nov'r, 1832.—Rec'd of the New York and Harlem Railroad Company the sum of $104.68 in full of the amount awarded to Samson Adolphus Benson by the com'rs for taking away certain lands for the use of the company.

$104.68. BENJ'N L. BENSON,
Testamentary Guardian of Samson Adolphus Benson."

(10.) On the 28th day of December, 1832, the final order in said proceedings was duly filed, and on the eighth day of January, 1833, as required in said order, duly recorded in the office of the register of deeds in and for the city and county of New York, in Liber 292 of Conveyances, at page 1. Said final order is as follows:

Final decree in a court of chancery before the vice-chancellor, held December 28th, 1832, in the matter of the petition of the New York and Harlem Railroad Company in relation to certain lands required to be entered upon and taken possession of for the use of said company.

At a court of chancery held for the State of New York on the 28th day of December, 1832, present, William T. McCoun, vice-
96 chancellor of the first circuit.

In the Matter of the Petition of the New York and Harlem Railroad Company in Relation to Certain Lands Required to be Entered upon and Taken Possession of for the Use of said Company.

The New York and Harlem Railroad Company having, by their petition filed in the office of the clerk of this court on the 3d day of April, 1832, among other things set forth that for the purpose of constructing their single or double railroad or ways, and in order to keep the line, course, road or way thereof, the said petitioners required to be seized and possessed of the fee simple of the following lands and real estate, namely:

I. All that certain piece of land bounded west by a line drawn parallel to the westerly side of the 4th avenue on the easterly side thereof at the distance of 38 feet therefrom. Easterly by a line drawn parallel to the westerly side of the 4th avenue at the distance of sixty-two feet therefrom. Northerly by the old road leading from Harlem to Kings bridge and southerly by land of Peter Poillon being about 780 feet in length on each side by about 24 feet wide. The fee of which was in one Samson A. Benson, an infant under the age of fourteen years.

On the reading and filing of which petition the said vice-chancellor by an order bearing date the day and year last aforesaid, ordered and directed that the time and place of hearing the parties interested in the prayer of said petition should be Tuesday, the 24th day of April then instant at 10 o'clock in the forenoon of that day and at the court room in the city hall of the city of New York wherein the court of chancery should happen to be held, and that fourteen days before such period of hearing, a copy of said
97 orders and of the petition should be served upon the parties mentioned in said petition, and at a court of chancery held at the city hall in the city of New York on the 27th day of April, 1832, before the said vice-chancellor an order was made. On the reading and filing affidavits proving that notice had been given of the time and place of hearing, the parties interested in the land and real estate embraced in said petition pursuant to the order dated 6th April, 1832, and on hearing and filing the said petition it was further ordered by the said vice chancellor of the first circuit that John Leonard, of the city of New York, merchant; Charles Oakley, of the same city, merchant; and John B. Thorp, of said city, gentleman (all of them being freeholders as well as residents

of the city of New York), be and thereby were appointed the commissioners to make appraisements and determine the damages which the respective owners aforesaid of the different lands and grounds hereinbefore described, would sustain by the occupation thereof in fee for the purposes of the said railroad. And it was also therein ordered that notice of such appointment be given to said commissioners by serving a copy of such order upon them respectively. And that the said commissioners should thereupon name a day for a meeting on the lands to view the premises required to be taken and should afterwards convene at some suitable place, to be by them appointed for the purpose of proceeding in the performance of the duties thereby required of them; that the said commissioners should give at least ten days' notice to the owners of the said lands of the time for viewing the premises, and of the time and place of meeting so to be appointed by the commissioners, but if any such owner be absent or subject to any legal disabilities to contract, a copy of such notice might be left at the dwelling house or
98 residence of any such owner or at some public place on the lands to be appraised.

That each commissioner, before he enter upon the duties of his trust, should take and subscribe in writing before the said vice-chancellor an oath or affirmation in substance that he would faithfully discharge the duties of the office of commissioner of appraisement according to the best of his ability, and that the said commissioner should then proceed to view the premises as aforesaid, and without favor or partiality appraise and determine the damages sustained by the respective owners and claimants of the said lands and real estate, and report the same in writing to the said vice chancellor of the first circuit with all convenient speed, and so that their report should contain a minute and accurate description of the lands appraised and any matter which the said commissioners might consider explanatory, necessary or desirable.

And it was therein further ordered that Benjamin L. Benson be appointed to appear on behalf of Sampson Adolphus Benson, an infant.

And at a court of chancery, held for the State of New York, at the city of New York, on the 16th day of July, 1832, before his honor William T. McCoun, vice-chancellor of the first circuit. It appearing by the report of the commissioners appointed as aforesaid, bearing date the 9th day of July, 1832, that they had in pursuance of such order appraised and determined the damages which Samson Adolphus Benson would sustain by the occupation of said New York and Harlem Railroad Company in fee of certain lands, hereditaments and appurtenances particularly hereinbefore described in pursuance of the aforesaid order of 27th of April, 1832, a further order was made by the said vice chancellor of the first circuit, bearing date on that day, whereby it was ordered that the said re-
99 port be filed with the clerk of the court of chancery for the first circuit of the State of New York, for the perusal and inspection of all the parties aforesaid, and all others interested in such

appraisement and determination of damages, and that all such parties appear before such vice-chancellor on Monday, the 30th day of July, then instant, at 10 o'clock in the forenoon of that day, in the court room in the city hall in the city of New York, wherein the court of chancery might then happen to be held, when the said report of the commissioners would be examined and the said parties be heard in relation thereto, and the damages increased or diminished, provided the said vice-chancellor should then and there be satisfied injustice has been done.

And it is further ordered that all such parties as should claim, or did intend to claim, an increase of the said damages, furnish the said vice-chancellor with their objections, in writing, to said report, and the grounds upon which they claimed such increase, and the amount thereof, on or before that time.

And it was further ordered that a copy of said order be published, as notice to the parties interested, in three of the public newspapers of the city of New York daily for ten days at least. And at a court of chancery held for the State of New Yerk, at the city of New York, on 30th day of July, 1832, before his honor William T. McCoun, vice chancellor of the first circuit, it appearing by the affidavits of Edward S. Howard, Cornelius B. Marshall and Thomas Gill that the said order was published in three of the newspapers of the city of New York, daily, for at least ten days previous to said 30th day of July, 1832, and the said vice-chancellor having examined the report of the said commissioners of appraise-
100 ment whereby it appears that said commissioners have made appraisement and determined the damages which Samson Adolphus Benson will sustain by the petitioners occupying and taking in fee the land set forth in said petition as belonging to him to amount to the sum of $104.68, and that Amos Jones and Leonard Jones have a lease on the same, two years of which is unexpired from April 1st, 1832, subject to a ground rent of three dollars and twenty-three cents per acre, and that the said commissioners award to said lessees for their damages, the sum of two dollars and seventy-eight cents, and upon such examination of the report of said commissioners of appraisement, no objections having been made to the same by any of the parties aforesaid except William Wilson in respect to the smallness of the damages allowed by the said commissioners in their report.

Whereupon a further order was made by his honor the vice chancellor of the circuit, bearing date the 26th day of October, wherein he ordered, adjudged and decreed by virtue of the power and authority vested in him by the said act that the said report, with his amendment attached to the same increasing the damages of the said William Wilson as aforesaid, and everything therein contained, should stand ratified and confirmed, and it was therein further ordered that the said petitioners either pay to the owners aforesaid the sums of money so awarded to them as aforesaid, or deposit the same to the credit of the said owners in the bank of the New York Chemical Manufacturing Company in the city of New York.

And on reading and filing the certificate of Archibald Craig, cashier of the bank of the New York Chemical Manufacturing Company, bearing date the 17th day of November, 1832, whereby it appears that the said petitioners on that day deposited in
101 said bank to the credit of Amos Jones and Leonard Jones the sum of two dollars and seventy-eight cents, and on reading and filing the receipt of Benjamin L. Benson, testamentary guardian of Samson Adolphus Benson, whereby it appears that he has received from the said petitioners the sum of one hundred and four dollars and sixty-eight cents awarded to him as aforesaid.

And on motion of Mr. Charles Edwards, of counsel for the said petitioners, it is ordered, adjudged and decreed, and his honor, the vice-chancellor of the first circuit, by virtue of the power and authority vested in him by the act of the legislature of the State of New York, entitled "An act to incorporate the New York and Harlem Railroad Company, passed the 25th day of April, 1831," doth order, adjudge and decree that under and by virtue of the proceedings herein detailed and referred to, the said corporation of the New York and Harlem Railroad Company have become and are entitled to be seized and possessed in fee simple of all such lands or real estate hereinbefore particularly described and in relation to which the appraisement of damages has been made as aforesaid, and may enter upon, take and use the same for the purposes of said road, and shall be seized thereof and possessed in fee simple upon this order or decree being recorded in the office of the register of deeds in and for the city and county of New York.

JOHN WALWORTH, Clerk. [L. S.]

Recorded January 8, 1833.
Request of Isaac Adriance.

(11.) On the 16th day of February, 1833, a final decree setting forth all of said proceedings was duly signed, enrolled and filed.

102 Resolutions of the Common Council.

Approved by the Mayor October 11, 1831.

"*Resolved*, That the maps presented by the New York and Harlem Railroad Company, so far as the same locate the route of the said railroad from the north side of Twenty-third street through the centre of Fourth avenue to Harlem river, and the branch of the same through the centre of One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, be approved, upon condition that neither this approval nor anything herein contained shall be construed into a consent to the said company to construct the said railroad; but that the said company shall first obtain the consent of the mayor, aldermen and commonalty of the city of New York before they commence the construction of said road."

(Here follows diagram marked page 103.)

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104 Now York and Harlem Railroad.

Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the Mayor, Aldermen, and Commonalty of the City of New York, parties of the second part:

Whereas, an ordinance of the common council of the city of New York was passed by the board of aldermen on the sixteenth day of December, last, and by the board of assistants on the 19th day of December last, and approved by the mayor of said city on the twenty-second day of December last, which ordinance is in words and figures following, to wit:

A Law to Authorize the New York and Harlem Railroad Company to Construct their Railway.

Section 1. Be it ordained, etc., That the New York and Harlem Railroad Company be, and they hereby are, permitted to construct and lay down, in pursuance of their act of incorporation, a double or single track or railroad, or railway, along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity with a map now on file in the register's office, and a branch thereof along One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, provided that the width of such double railroad or way shall not exceed twenty-four feet.

Section 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New York and Harlem Railroad Co., it shall appear to the mayor, alder-
105 men and commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue (of which the said mayor, aldermen and commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said mayor, aldermen and commonalty, forthwith provide a remedy for the same, satisfactory to the said mayor, aldermen and commonalty; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down; and, should the said directors decline or neglect to obey such requisition, the said mayor, aldermen and commonalty, may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed, and the avenues or streets restored as aforesaid, at the expense of the said railroad company.

Section 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and

the speed of the same, as well as all other power reserved to the said mayor, aldermen and commonalty, by the act of incorporation of the said company, or any part thereof be, and the same are hereby, expressly retained and reserved.

SECTION 4. That it shall expressly be incumbent on the said New York and Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets now or hereafter to be made (which will be intersected by the embankments or
106 excavations of the said railroad), and which, in the opinion of the common council, the public convenience requires to be arched or bridged, and also to make such embankments or excavations as (in the opinion of the common council) may be required to make the passage over the railroad and embankments, at the intersected cross streets easy and convenient for all the purposes for which streets and roads are usually put to; and also, that the said company shall make at their own like cost and charges, all such drains and sewers as their embankments and excavations may (in the opinion of the common council) make necessary; all which work to be done under the like requisition, and under like disabilities, as in the second section of this ordinance mentioned. And further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulation of the avenue and road through which said railroad passes.

SECTION 5. That it shall be incumbent on the said New York and Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation; and unless they commence and complete the same in the periods of time for the said commencement and completion in said incor, ation specified, that then the consent of the common council, and all the powers and privileges given in this ordinance, shall cease and be null and void.

SECTION 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or, if any time after the construction of the said railroad, the same should be discontinued, or not kept up and in repair as a good and sufficient railroad, that then the strip of land to be taken for the
107 said railroad should be thrown open and become a part of the street or public avenue, without any assessment on the owners of the adjoining land or the public therefor.

SECTION 7. That no building shall be erected on the said strip of land to be taken for said railroad, and that a railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railing or fences on the edges of the excavations, as the common council shall, from time to time, deem necessary to prevent accidents and loss of lives to our fellow-citizens.

SECTION 8. That this ordinance shall not be considered as binding on the common council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing

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(promising, covenanting and engaging, on their part and behalf, to stand to, abide by and perform all the conditions and requirements in this ordinance contained) as the mayor and the counsel of the board shall, by their certificate approve, and not until such instruments shall be filed, so certified, in the comptroller's office of this city.

Passed by the board of aldermen, December 16, 1831.

Passed by the board of assistants, December 19, 1831.

Approved by the mayor, December 22, 1831.

Now, this agreement witnesseth, that for and in consideration of the premises, and in pursuance of the requirements of the eighth section of said ordinance, the said parties of the first part do hereby for themselves and their successors, promise, covenant and engage to and with the said parties of the second part and their successors and assigns, to stand — abide by and perform all the conditions and requirements in the said ordinance contained.

108 & 109

In witness whereof, the said parties of the first part have hereunto affixed their corporate seal and caused the same to be signed by their vice-president (in the absence of their president), and attested by their secretary, the day and year aforesaid.

JOHN MASON, [L. S.]
Vice-President.

Witness:
ISAAC ADRIANCE.
Secretary *pro tem.*

(Here follows diagram marked page 110.)

111 & 113 Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are true copies of the judgment roll, papers, notice of appeal and case and exceptions in this action on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, March 22, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorneys for Defendants-Appellants.

It is hereby consented that the within-printed case on appeal may be ordered filed as and for the original case on appeal, as settled herein.

Dated New York, March 22, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

It is so ordered.

Dated New York, March 25, 1901.

ABM. R. LAWRENCE, J. S. C.

113 At a term of the appellate division of the supreme court for the first department, held at the court house of the appellate division in the county of New York, on the 29th day of April, 1901.

Present: Hon. Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch, J. J.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Order of Affirmance.

The defendants having appealed to this court from the judgment in this action, entered in the office of the clerk of the county of New York on the 18th day of January, 1901, in favor of the plaintiff and against the defendants, for $4,483.85 damages and costs and for an injunction, and the said appeal having come on to be heard, and having been duly argued by Ira A. Place, Esq., for the appellants, and Alfred B. Cruikshank, Esq., for the respondent, and due deliberation having been had thereon;

Now, on motion of Atwater & Cruikshank, attorneys for the plaintiff-respondent, it is

Ordered, that said judgment be and the same hereby is affirmed, with costs and disbursements to the respondent.

114 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Judgment of Affirmance.

The defendants above named having appealed to the appellate division of this court from the judgment entered herein on the 18th day of January, 1901, in the office of the clerk of the county of New York, in favor of the plaintiff and against the defendants, and said appeal having been duly heard by said appellate division, and the said judgment having been affirmed, with costs to the plaintiff, by the appellate division, as appears by the remittitur from said appellate division, duly filed in the office of the clerk of the county of New York on May 7th, 1901, and the costs of the plaintiff having been duly taxed at the sum of ninety-six and 55/100 dollars;

Now, on motion of Atwater & Cruikshank, attorneys for plaintiff, it is

Adjudged, that the said judgment entered herein on January 18th, 1901, be and it hereby is in all things affirmed; and it
115 is further adjudged, that the plaintiff, Alice I. Birrell, recover of the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of ninety-six and 55/100 dollars, costs of said appeal, and that execution issue therefor.

Dated New York, May 7th, 1901.

WILLIAM SOHMER, Clerk.

116 Supreme Court, Appellate Division, First Department, April, 1901.

Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Judgment affirmed, with costs. No opinion. (Van Brunt, P. J., dissenting.) 60 App. Div. Reports, 630.

STATE OF NEW YORK,
County of New York,
} ss:

Charles C. Paulding, being duly sworn, deposes and says: That he is an attorney and counselor-at-law, and is of counsel for the de-

fendants in the above-entitled action, and is familiar with the different proceedings in the action; that the foregoing memorandum was handed down by the appellate division upon the decision of the appeal herein, and no opinion was rendered.

CHARLES C. PAULDING.

Sworn to before me this 23d day of September, 1901.

JOHN A. MATTISON,
Notary Public, New York County, N. Y.

117 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Notice of Appeal to the Court of Appeals.

SIRS: Please take notice that the defendants above named and each of them hereby appeal to the court of appeals from the judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of New York county on the 7th day of May, 1901, upon an order entered in the office of the clerk of the said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of New York county on the 18th day of January, 1901, in favor of the above-named plaintiff and against the defendants, which judgment awarded the plaintiff herein an injunction unless the defendants paid the sum of seven thousand and fifty dollars fee damages, and further awarded the plaintiff a money judgment against the defendants for the sum of eighteen hundred and eighty-three and 33/100 dollars, be affirmed, with two hundred and
118 ninety-two and 67/100 dollars costs to the plaintiff, and from each and every part of said judgment.

Dated borough of Manhattan, N. Y. city, N. Y., May 22, 1901.

Yours, &c.,

IRA A. PLACE,
Attorney for Defendants-Appellants.

Office and post office address, room 417 Grand Central station, borough of Manhattan, New York city, N. Y.

To William Sohmer, Esq., county clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.; and

Atwater & Cruikshank, Esqs., attorneys for plaintiff-respondent, 43 Cedar street, borough of Manhattan, New York city, N. Y.

119 In the Court of Appeals.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Stipulations under Sections 3301 and 1353 of the Code.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the judgment roll, papers, notice of appeal to the appellate division of the supreme court, case and exceptions, of the order of the appellate division, and of the judgment entered thereon, and of the notice of appeal to the court of appeals, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, N. Y., September 24, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

120 Memorandum Opinion of Court of Appeals.

ALICE I. BIRRELL, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY ET AL., Appellants.

Birrell *v.* N. Y. & Harlem R. R. Co., 60 App. Div. 630, reversed.

(Argued November 18, 1902; decided February 24, 1903.)

Appeal from a judgment of the appellate division of the supreme court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at special term.

Ira R. Place, Alexander S. Lyman and Thomas Emery for appellants.

Alfred B. Cruikshank, Henry G. Atwater and John C. Thomson for respondent.

Judgment reversed and complaint dismissed without costs; no opinion.

Concur: Parker, Ch. J., Bartlett, Haight, Martin, Vann and Werner, JJ. Not sitting: Gray, J.

121 At a special term, part II, of the supreme court, held in and for the county of New York, at the county court house, in said county, on the 31st day of March, 1903.

Present: Hon. Samuel Greenbaum, justice.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The defendants herein having appealed to the court of appeals of the State of New York from a judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of the county of New York on the 7th day of May, 1901, upon an order entered in the office of the clerk of the said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of the county of New York on the 18th day of January, 1901, be affirmed, with costs, and the said court of appeals having directed that the said judgment be reversed and the complaint dismissed without costs, and having directed that the record of the proceedings be remitted to this court to be
122 enforced according to law, and the said remittitur having been duly filed in the office of the clerk of the county of New York; now, on motion of Ira A. Place, Esq., attorney for the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, it is

Ordered, that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that this order and the judgment to be entered hereon be annexed to the judgment roll.

S. G., J. S. C.

123 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The judgment herein, in favor of the plaintiff and against the defendants, having been entered in this court on the 18th day of January, 1901, upon a decision of the Hon. Abraham R. Lawrence, J., for an injunction and for the sum of four thousand four hundred and eighty-three and eighty-five hundredths dollars ($4,483.85) and the defendants having appealed from said judgment to the appellate division of the supreme court for the first department, and the said

judgment having been affirmed by the said appellate division and judgment of affirmance having been accordingly entered therein on the 7th day of May, 1901, and the said defendants having appealed therefrom to the court of appeals, and the said court of appeals having sent hither, its remittitur, filed herein on the 31st day of March, 1903, by which it appears that the said court of appeals has reversed the said judgment so appealed from, without costs, and has given judgment accordingly, and has remitted its judgment to this court to be enforced according to law, and this court having, by order dated the 31st day of March, 1903, and duly entered herein,
124 ordered that the said judgment of the court of appeals be made the judgment of this court; now, on motion of Ira A. Place, Esq., attorneys for the defendants herein, it is

Adjudged that the judgment of said court of appeals be, and the same hereby is, made the judgment of this court; and it is further

Ordered and adjudged, that the said judgments of the supreme court herein so appealed from be, and the same hereby are, reversed and the complaint dismissed, without costs.

Judgment signed and entered this 31st day of March, 1903.

THOMAS L. HAMILTON, Clerk.
M. J. D.

124½ [Endorsed:] Supreme court, New York county. Alice I. Birrell, plaintiff, against The New York & Harlem Railroad Co., *et al.*, defendants. Judgment on remittitur from court of appeals. Ira A. Place, defendants' att'y.

125 In the Supreme Court of the United States.

ALICE I. BIRRELL, Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants in Error. } Assignment of Errors.

Afterwards, to wit, on the seventh day of January, in the year of our Lord, one thousand nine hundred and four, in this same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes Alice I. Birrell, plaintiff in error herein, and by her attorneys and counsel Henry G. Atwater and Alfred B. Cruikshank, says:

That in the record, proceedings, decision and final judgment of the court of appeals of the State of New York, and of the supreme court of the State of New York aforesaid, in the above entitled suit or action, there is manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment aforesaid given, was given by the court of appeals of the State of

New York against the said Alice I. Birrell, plaintiff in error, and in favor of The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error; whereas, by the law of the land the said judgment ought to have been given for the said Alice I. Birrell against
126 the said New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

II. That the said court of appeals of the State New York erred in holding and decidin,g that the complaint of the plaintiff in error should be dismissed.

III. That the said court of appeals of the State of New York erred in holding and deciding that, under the statute authorizing or requiring the erection and maintenance of the elevated railroad structure and the operation thereon of trains as complained of by the plaintiff in error, the plaintiff in error has no remedy against the defendants in error and defendants in error below, herein; thereby holding and deciding that the said plaintiff in error might be and has been deprived of *his* property by said defendants without due process of law; the said court of appeals thus holding and deciding in violation of the Constitution of the United States and especially of section I, article XIV of the amendments to said Constitution.

IV. That the said court of appeals of the State of New York erred in holding that chapter 339 of the Laws and Statutes of 1892 of the State of New York, is constitutional and that it does not offend against that portion of the fourteenth amendment to the Constitu-
127 tion of the United States, providing that a person shall not be deprived of property without due process of law; whereas in fact and in law the said act and statute is repugnant to section I, of article XIV of the amendments to the Constitution of the United States; and further that whereas the property of the said plaintiff, as shown by said record and proceedings consists of rights and easements of light, air and access in and over Park or Fourth avenue, a public street in the city of New York, appurtenant to the premises of the said plaintiff in error, abutting on said avenue, the said court of appeals of the State of New York erred in deciding in favor of sustaining the validity of said act and statute of said State, the effect of which has been to deprive said plaintiff of said property without due process of law.

V. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under chapter 339 of the Statutes of 1892 of the State of New York, namely, the authority to take by or on behalf of the defendants in error and defendants below, the said plaintiff's property, consisting of rights and easements of light, air and access appurtenant to her said premises, without compensation to her and without due process of law, in violation of section I of article XIV of the amendments to the Constitution of the United States.

128 VI. That the said court of appeals of the State of New York erred in holding and deciding that the said State had authority and that the authority exercised by the State and under the statute aforesaid was valid to compel or allow defendants in error to maintain a railroad viaduct and to operate trains of cars thereon in front of said property rights and easements, of the said plaintiff in error and that the defendants in error were under no liability to compensate said plaintiff in error therefor, or for the injury inflicted upon her said premises by reason of such maintenance and operation, and that the taking of a portion of the property of the plaintiff in error in the manner complained of, was and could be made valid by statute, that is by chapter 339 of the Laws of 1892 of the State of New York; and that said holding and decision of said court of appeals, was, and is repugnant to section I of article XIV of the amendments to the Constitution of the United States.

VII. That the said court of appeals of the State of New York erred in holding that chapter 339 of the New York Laws of 1892 is constitutional and that it does not contravene section 10 of article I of the Constitution of the United States forbidding the impairment of the obligation of contracts; whereas in fact and in law the said act is repugnant to the said section in that it does not impair the obligation of a contract, namely, the contract under which Park or Fourth avenue in the city of New York was dedicated as a public street
129 in and by the deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827, and set forth in the record of the proceedings herein; and said statute further impairs the obligation of the contract existing among the parties to this action arising from the fact that the said parties all claim title under said Peter Poillon through conveyances which recognize and establish the property rights of the plaintiff in error as aforesaid.

VIII. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said statute and under chapter 339 of the Laws of the State of New York, of the year 1892, whereby the easements and rights of the property of the plaintiff in error aforesaid were taken and appropriated by defendants in error and thereby she was deprived of said property rights and easements without compensation, for the reason that said authority was repugnant to section 10 article I of the Constitution of the United States, in the respect that it impairs the obligation of said contracts in last assignment referred to.

130 IX. That the said court of appeals of the State of New York erred in holding and deciding that the defendants in error were and are under no liability to compensate the plaintiff in error for the damages and injury inflicted upon her said premises by reason of either the erection, maintenance and operation of said viaduct structure or the operation of trains in front of plaintiff's premises and in holding and deciding that said defendants were and are pro-

tected from such liability by the authority of a statute of said State, namely, chapter 339 of the Laws of 1892 thereof, such decision being repugnant to the Constitution of the United States and to section 10 of article I and to section I of article XIV thereof.

Wherefore, the said Alice I. Birrell, plaintiff in error, prays that the said judgment of the said court of appeals of the State of New York be reversed, annulled and altogether held for nothing and that she may be restored to all things which she has lost by occasion of the said judgment, etc., and that she may have such other and further relief, according to law, as to the court may seem just and proper.

HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York.

130½ [Endorsed:] In the supreme court of the United States. Alice I. Birrell, plaintiff in error, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error. Orig. Assignment of errors. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within assignment of errors is hereby admitted this 30th day of Jan'y, 1904. Rec'd copy Jan'y 30th, '04. Ira A. Place, att'y for deft R. R. Co's. Attorney and solicitor for the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

131 In the Supreme Court of the United States.

ALICE I. BIRRELL, Plaintiff in Error & Original Plaintiff, *against* THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants in Error & Original Defendants.	Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Alice I. Birrell, respectfully shows:

That your petitioner is a resident and citizen of the city and State of New York, and was at all the times hereinbefore mentioned, the owner of certain valuable land and premises situated in the borough of Manhattan, city, county and State of New York, and abutting upon Park avenue, a public street in said borough, and city, was at the times hereinafter mentioned the owner of certain easements in said avenue of light, air, access, etc.; that prior to the commencement of the above entitled original suit or action the defendants

therein, the defendants in error above named, The New York & Harlem Railroad Company and The New York Central and Hudson River Railroad Company, had been for a long time maintaining and operating an elevated railroad in said street or avenue in front of your petitioner's said premises.

That on or about January 27, 1897, your petitioner commenced said action against said defendants in the supreme court of the State of New York to recover the damages sustained by your peti-
132 tioner by said maintenance and operation, whereby your petitioner claimed that the said easements had been taken and impaired by said defendants unlawfully and without due compensation, and to recover an injunction against the further maintenance and operation of said elevated railroad, as appeared by the complaint of your petitioner in said action. Said defendants appeared and as a defense to the complaint in said suit or action, interposed an answer setting up in substance the provisions of certain acts of the legislature of the State of New York, namely, chapter 339 of the Laws of 1892, and amendments thereof, as command and authority to defendants to maintain and operate said elevated railroad.

That under the practice in said New York supreme court, no further pleading and no reply to said defense was allowed or required.

That said action came to trial thereafter in said supreme court at a special term thereof on the 5th day of November, 1900, before Hon. Abraham R. Lawrence, justice, and thereupon and on January 14, 1901, the trial court overruled said defense and held the same to be invalid, and gave judgment in favor of the plaintiff for an injunction and for $4483.85 damages, and for other relief.

That upon appeal duly taken by both parties to the appellate division of the supreme court for the first department, the said judgment was duly affirmed and judgment of affirmance thereof entered on May 7, 1901.

That from said judgment of affirmance both parties thereupon appealed to the court of appeals of the State of New York, the same being the highest court of said State in which a decision in
133 the said suit could be had. Whereupon the said court of appeals on February 24, 1903, made a final judgment or decree in said suit or action, directing that the said judgment of the appellate division of the supreme court so appealed from be reversed and plaintiff's complaint be dismissed and that the record be remitted to the supreme court of the State of New York to be enforced according to law; that said record was thereupon so remitted accordingly, and thereafter and on March 31, 1903, final judgment was entered in and by said supreme court in obedience to the judgment of the court of appeals, and according to the law and practice of the State of New York whereby it was adjudged that said judgment of the court of appeals be made the judgment of the supreme court, and that the judgment previously rendered in favor of your peti-

tioner by said supreme court be reversed and your petitioner's complaint be dismissed as aforesaid.

That in said court of appeals there was drawn in question the validity of the said statutes of the State of New York and the authority exercised thereunder by defendants on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of the validity of said statute and the authority exercised thereunder; that in said court of appeals it was claimed by your petitioner that the said acts of the legislature directing the taking of private property without due process of law and therein offended against the provision of the fourteenth amendment of the Constitution of the United States, and that they contravened the provisions of the Constitution of the United States, which forbid
134 the impairing of the obligation of a contract, namely, section 10 article 1, of said Constitution.

That thereupon said court of appeals in said suit or action and in its decision therein overruled the said claims of your petitioner and decided in favor of the validity of said statute and the authority exercised thereunder.

Wherefore, your petitioner prays for a writ of error directed to the supreme court of the State of New York, commanding that court to send a record of the proceedings in the said suit or action aforesaid, and all things concerning the same, to the justices of the Supreme Court of the United States and for the usual citations and supersedeas to the end that the record of the proceedings being inspected the said justices of the Supreme Court of the United States may cause further to be done therein to correct all errors what of right and according to law and the law and Constitution of the United States ought to be done.

And your petitioner will ever pray.

ALICE I. BIRRELL.
HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York City.

135 STATE OF NEW YORK, }
County of New York, Southern } ss:
District of New York, }

Alice I. Birrell, being duly sworn, says:

That she is the plaintiff in error herein; that the foregoing petition is true to the best of her knowledge information and belief.

ALICE I. BIRRELL.

Sworn to before me this 15th day of December, 1903.

FRED KOCH,
Notary Public, N. Y. Co.

Allowed this 7th day of January, 1904.
ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

136 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which Alice I. Birrell is plaintiff and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company are defendants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals in the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered February 24, 1903, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between Alice I. Birrell, plaintiff, and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants, and which has been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of the statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the damage of the said Alice I. Birrell, as by complainant's complaint appears; we being willing that error, if any hath been, should be duly
137 corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if a judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of January, in the year of our Lord one thousand nine hundred and four.

Allowed by
ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

137½ [Endorsed:] In the Supreme Court of the United States. Alice I. Birrell, plaintiff in error & original plaintiff, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error & original defendants. Orig. petition and writ of error. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within petition and writ of error is hereby admitted this 30th day of January, 1904 (Over) —— ——, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company Received supreme court N. Y. Feb. 1st 1904 Rec'd copy Jan'y 30/04 Ira A. Place att'y for def't R. R. Cos.

138 Citation.

UNITED STATES OF AMERICA, ss:

To the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of New York, wherein Alice I. Birrell is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 7th day of January in the year one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

138½ [Endorsed:] In the Supreme Court of the United States. Alice I. Birrell, plaintiff in error & original plaintiff, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error & original defendant- Orig. citation. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within citation is hereby admitted this 30th day of January 1904 (Over) —— ——, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company Ira A. Place att'y for def't R. R. Cos. Rec'd supreme court N. Y. Feb. 1, 1904. Rec'd copy Jan'y 30/04.

139 Know all men by these presents: That we, Alice I. Birrell, of the county of New York, and State of New York, as principal, and The United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the New York and Harlem Railroad Company, and the New York Central and Hudson River Railroad Company, both corporations organized under the laws of the State of New York, in the full and just sum of five hundred dollars ($500 00), to be paid to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, their certain attorney, successors or assigns; to which payment well and truly to be made, the said Alice I. Birrell binds herself, her heirs, executors and administrators, and the said The United States Fidelity and Guaranty Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of December, in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at a plea in the court of appeals of the State of New York, held at Albany, New York, on February 24, 1903, in a suit depending in the supreme court of the State of New York, between the said Alice I. Birrell, plaintiff, and The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants, a judgment upon return from said supreme court was rendered against the said Alice I. Birrell and in favor of the said New York and Harlem Railroad

140 Company and The New York Central and Hudson River Railroad Company, dismissing her complaint without costs, and the said Alice I. Birrell having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Alice I. Birrell shall prosecute said writ of error to effect, and answer all costs if she fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

ALICE I. BIRRELL.

{ Seal of the United States Fidelity & Guaranty Company. Incorporated 1896. }

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, Manager.

Attest: GEORGE E. HAYES, Attorney-in-fact.

Sealed and delivered in the presence of
FRED KOCH.

141 STATE OF NEW YORK, County of New York, } ss:

On this 26th day of December, 1903, personally appeared before me Alice I. Birrell to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

[Seal of Fred. Koch, Notary Public, New York County.]

FRED KOCH,
Notary Public, New York County.

STATE OF NEW YORK, County of New York, } ss:

On the 18 day of Dec., in the year 1903, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Sylvester J. O'Sullivan, further said that he was acquainted with George E. Hayes, and knew him to be the attorney-in-fact of said company; that the signature of said George E. Hayes, subscribed to the within instrument, is in the genuine handwriting of said George E. Hayes, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Sylvester J. O'Sullivan.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

STATE OF NEW YORK, County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Alonzo G. Oakley whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a commissioner of deeds in and for the city of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such commissioner,

and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court and county, the 19th day of Dec. 1903.

[Seal of New York.]

THOS. L. HAMILTON, Clerk.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the ninth day of November, A. D., 1903, at the office of the company, in the city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Leonidas Dennis, or Charles W. Young, or George E. Hayes, or W. C. Schryver, or Gilman Ashburner, or H. C. Nash, attorneys-in-fact of this company in the State of New York, be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, }
County of New York, } ss:

I, George E. Hayes, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said resolution.

Given under my hand and the seal of the company, at the city of New York, this 18 day of Dec. 1903.

{Seal of the United States Fidelity & Guaranty Company. Incorporated 1896.}

GEORGE E. HAYES,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company Rendered to the Department of Justice, Washington, D. C., at the Close of Business, September 30, 1903.

Assets.

Investments, stocks and bonds (market value)	$1,933,501.56
Cash on hand and in banks	117,033.44
Collateral loans	159,935.00
Real estate	264,920.67
Loans on mortgage	41,925.00
Mortgages and other collateral ac. salvage	4,000.00
Agents' balances, fidelity and surety, less commissions	326,913.30
Agents' balances, burglary, less commissions	50,138.91
Due for subscriptions, department of guaranteed attorneys	33,360.05
Advanced ac. contracts, secured	399,395.26
Interest due and accrued	17,756.31
	$3,348,915.50

Liabilities.

Capital stock paid in cash	$1,695,200.00
Cash collateral deposits	96,148.64
Surplus and reserve	1,457,566.86
	$3,248,915.50

STATE OF NEW YORK, County of New York, } *ss.:*

George E. Hayes, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of September 30th, 1903, and that the financial condition of said company is as favorable now as it was when such statement was made.

GEORGE E. HAYES.

Subscribed and sworn to before me this 18 day of Dec. 1903.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

142 [Endorsed:] Alice I. Birrell and the United States Fidelity and Guaranty Company to the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company. Orig. Penalty $500.00. Dated, December 18, 1903. Approved Ja'y 7 1904 Alton B. Parker Ch. J. Rec'd N. Y. supreme court Feb. 1 1904 Atwater & Cruikshank, attorneys at law, 43 Cedar street, New York city. Service of a copy of the within undertaking is hereby admitted this 30th day of January 1904. —— —— attorney and solicitor for defendants in error The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company. Rec'd copy Jan'y 30/04. Ira A. Place att'y for def't R. R. Co's.

143 UNITED STATES OF AMERICA:

Supreme Court.

STATE OF NEW YORK, County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court in said county, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, ending with No. 124 contain a true and complete transcript of the record and proceedings had in said supreme court and in the court of appeals of the State of New York in the cause of Alice I. Birrell, plaintiff in error and plaintiff below, against The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error and defendants below, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the defendants in error and undertaking to prosecute said writ of error and copy of the opinion of the said court of appeals, all of which were filed in the office of said clerk on the 1st day
M. J. D. of February A. D. 1904, and constitute the return to said writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 2nd day of February, A. D. 1904.

(Seal of New York.)

THOS. L. HAMILTON,
Clerk of the Supreme Court in the County of New York.

144 [Endorsed:] In the Supreme Court of the United States. *Patrick Kierns*, plaintiff in error, against The New York & Harlem Railroad Company & ano., defendants in error. County clerk's certificate.

Endorsed on cover: File No. 19,259. New York supreme court. Term No. 202. Alice I. Birrell, plaintiff in error, *vs.* The New York and Harlem Railroad Company & The New York Central & Hudson River Railroad Company. Filed March 3rd, 1904. File No. 19,259.

(19,260.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 203.

PATRICK KIERNS, EXECUTOR AND TRUSTEE OF JOHN KIERNS, DECEASED, PLAINTIFF IN ERROR,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1905.

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a STATE OF NEW YORK, *ss*:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 24th day of February, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, Clerk.

Remittitur, February 25th, 1903.

JOHN KIERNS, Respondent,
ag'st
THE NEW YORK AND HARLEM RAILROAD COMPANY and Another, Defendant.

Be it remembered, that on the 25th day of September in the year of our Lord one thousand nine hundred and one The New York and Harlem Railroad Company and another the appellants in this action came here into the court of appeals, by Ira A. Place their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department. And John Kierns the respondent in said action afterwards appeared in said court of appeals by
b Atwater & Cruikshank his attorneys. Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

"That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14 and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this court of appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

Whereupon, the said court of appeals having heard this cause argued by Mr. Ira A. Place of counsel for the appellants, and by Mr. Alfred B. Cruikshank of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and complaint dismissed without costs.

And it was also further ordered, that the record aforesaid, and the

proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed and complaint dismissed without costs as aforesaid.

c And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 25th, 1903.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

d In the Court of Appeals.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Case on Appeal.

Atwater & Cruikshank, attorneys for plaintiff-respondent, 115 Broadway, borough of Manhattan, N. Y. city, N. Y.

Ira A. Place, attorney for defendants-appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

1 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Statement under Rule 41.

This action was commenced on the 23d day of September, 1897. The summons and complaint were served on the defendants on that

day. The answers of the defendants were served on the plaintiff on the 2d day of November, 1897.

The names of the original parties are as they appear in the above-entitled action in full. By an order entered herein on the 17th day of April, 1900, Ira A. Place, Esq., was substituted as attorney for the defendants in the place of Frank Loomis, Esq.; no other change in parties or attorneys has taken place pending the action,.

2 Supreme Court, City and County of New York.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 14th, 1897.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

Office and post office address, No. 115 Broadway, New York city.

3 Supreme Court, City and County of New York.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Complaint.

The plaintiff complains of the defendants, and alleges, upon information and belief:

I. That at all the times hereinafter mentioned each of the defendants was, and now is, a domestic corporation created for the purpose of building, maintaining and operating a steam railway.

II. That the plaintiff now is, and has been since April 12th, 1882, seized in fee simple and in possession of a lot of land, with the building thereon, situated on the southeast corner of One hundred and fourteenth street and Fourth or Park avenue, in the city of New York, and bounded and described as follows, viz:

Beginning at the southeast corner of One hundred and fourteenth street and Fourth avenue; running thence easterly along the southerly side of One hundred and fourteenth street seventeen (17) feet, five (5) inches; thence southerly and parallel with Fourth avenue and
4 partly through a party wall one hundred (100) feet and eleven (11) inches to the centre line of the block; thence westerly along said centre line seventeen (17) feet and five (5) inches to the easterly line of Fourth avenue, and thence northerly along said easterly line of Fourth avenue one hundred (100) feet and eleven (11) inches to the point or place of beginning.

III. The said Park avenue, in the city of New York (formerly known as Fourth avenue), is, and has been, since prior to the year 1870, a public street in said city, and was, prior to the year 1870, opened and established as a public street of the city of New York, by proceedings taken under and in accordance with an act of the legislature of the State of New York, passed April 9th, 1813, being chap. 86 of the Laws of 1813, entitled "An act to reduce several laws relating particularly to the city of New York into one act," and the statutes amendatory of and supplemental to said act.

IV. By virtue of the proceedings so taken under said statutes above mentioned, the title to said Park avenue was acquired and has always been and is now held by the city of New York in trust, that the same be appropriated and kept open for or as part of a public street, avenue or place forever, and the plaintiff's predecessors in title to the premises above mentioned were, during the time of their respective seizin and possession thereof, and plaintiff since his seizin and possession of the same has been and now is seized and possessed of an easement appurtenant to said premises to have the said Park avenue kept open and used only as a public street or avenue in like manner as other public streets and avenues in the city of New York were when said avenue was laid out and opened and now are and of right ought to be used; and since said Park avenue was opened and established as a public street aforesaid, there have been
5 and now are attached to said premises above mentioned, and appurtenant thereto, easements of light, air and access in and over Park avenue for the benefit of said premises and of plaintiff.

V. That prior to April 1st, 1873, the defendant, The New York and Harlem Railroad Company, had constructed and was operating a steam railroad over the surface of Park avenue in front of said premises, and on or about April 1st, 1873, the said New York and Harlem Railroad Company leased to the defendant, The New York Central and Hudson River Railroad Company, its said railroad on said Park avenue, and all its rights therein, for the term of four hundred and one years.

VI. That subsequent to said lease the defendants, without right or authority, as against the plaintiff or his predecessors in title, excavated the said Park avenue in front of the premises above mentioned and constructed in the cut or depression formed by such excavation a railway with numerous tracks, for the operation of a

steam railroad, and the defendants, for more than six years past, have maintained upon that portion of Park avenue which is subject to plaintiff's easements as aforesaid said railway in said cut or depression, with walls of masonry extending above the surface of said portion of said avenue, and at the present time said railway is, and for more than six years past has been, operated by trains drawn by steam engines, and under the said lease said railway is and has been maintained and operated as aforesaid for the benefit of both defendants.

VII. That in or about April, 1893, defendants began constructing, and have since continued to construct, and have in part erected
6 and since maintained upon that portion of Park avenue, which is subject to plaintiff's easements as aforesaid, a permanent elevated railway structure of iron and steel, supported by columns of iron and steel, standing on pedestals of masonry embedded in the soil of said avenue. The said structure rises many feet above the surface of said avenue and substantially and materially interferes with and impairs the easements of light, air and access as aforesaid appurtenant to the premises of plaintiff.

VIII. The defendants threaten and intend to maintain said elevated railway structure and to add thereto and enlarge and strengthen the same, and upon completion thereof to operate thereon trains of cars, drawn by steam engines, and the defendants intend to permanently maintain and operate said structure for the uses and purposes of a steam railroad.

IX. That by reason of the said acts of the defendants the easements appurtenant to plaintiff's said premises have been trespassed upon and injured, and the said premises have been deprived of light, air and access and the privacy thereof invaded, and the stability of the buildings thereon impaired, and the damages already sustained by the plaintiff, in consequence thereof, amount to the sum of five thousand (5,000) dollars, besides which the fee value of plaintiff's premises has been greatly diminished thereby.

X. That said additions to and enlargement of said elevated railway structure and the running of trains thereon, as aforesaid, will, to a still greater extent, deprive said premises of light, air, access, privacy, stability, quiet and other rights, and the easements appurtenant to said premises as aforesaid will be still further appro-
7 priated by the defendants and still greater and additional damages will be inflicted upon said premises, and the injuries hereinbefore described will be greatly increased and intensified.

XI. That said acts of the defendants have been, are and will be without warrant of law, without consent of plaintiff and without compensation to him, and that the said acts and the injuries complained of are and will be constant and continuous trespasses upon plaintiff's property and rights aforesaid, and to prevent a multiplicity of suits and to afford plaintiff adequate relief, the equitable interference of this court is necessary.

Wherefore plaintiff demands judgment:

(1.) For the sum of five thousand (5,000) dollars, as and for damages for the trespasses committed by defendant-, as above stated.

(2.) For an injunction perpetually enjoining and restraining the defendants, and each of them, from further maintaining or operating the above-described elevated railroad in front of plaintiff's premises, and a judgment directing the removal thereof.

(3.) For such other and further relief as may be just, with the costs of this action.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

8 CITY AND COUNTY OF NEW YORK, *ss:*

John Keirns, being duly sworn, says: That he is the plaintiff herein; that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

(S'd) JOHN KEIRNS.

Sworn to before me this 18th day of September, 1897.

(S'd) ELLA DROHEN,
Notary Public, New York County.

9 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW York Central and Hudson River Railroad Company, Defendants.

The Separate Answer of the Defendant The New York and Harlem Railroad Company Herein.

First.

1. Admits the allegation of the complaint contained in the paragraph thereof numbered "I."

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint contained in the paragraph thereof numbered "II."

3. Admits that certain portions of Park avenue in the city of New York, formerly known as "Fourth avenue," are, and have been since and prior to the year 1870 a public street, in said city, and that such portions were prior to the year 1870 opened and established as a public street of the city of New York, by proceedings taken under
10 chapter 86 of the Laws of 1813, passed April 9, 1813, but denies that the whole of the strip of land known as Park

avenue is now, or ever has been, a public street; and denies that by the proceedings instituted in or about the year 1853, upon the application of the mayor, aldermen and commonalty of the city of New York, for the opening of said Fourth avenue from 38th street to the northerly line of 135th street, under and pursuant to said chapter 86 of the Laws of 1813, no absolute or exclusive title to the strip of land 24 feet in width, the centre line of which coincided with the centre line of said Fourth avenue, and which was then actually, and still is actually, used for the purposes of the railroad of the defendant, The New York and Harlem Railroad Company, was ever acquired by the said mayor, aldermen and commonalty of the city of New York, and alleges that in and by said proceedings the said mayor, aldermen and commonalty of the city of New York did not acquire and made no attempt to acquire the easement in the portions of the bed of Fourth avenue 58 feet in width, extending upon each side of the 24-foot strip aforesaid, previously acquired from the owners thereof by the defendant, The New York and Harlem Railroad Company, for the purposes of its railroad.

4. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "IV.," and alleges that whatever title the said mayor, aldermen and commonalty acquired in and to the strip of land in the city of New York, 140 feet in width, and then known as Fourth avenue (now Park avenue), was subject to all the rights of this defendant, The New York and Harlem Railroad Company, its successors and assigns to maintain and operate the railroad existing at the time said proceedings for opening
11 said Fourth avenue were consummated by final order, and was also subject to the maintenance and operation of any railroad of the defendant, The New York and Harlem Railroad Company, thereafter constructed in, under, upon or over any portion of said strip of land pursuant to the authority and direction of the legislature of the State of New York.

5. Admits that prior to April 1, 1873, this defendant, The New York and Harlem Railroad Company, had constructed and was operating a steam railroad over the surface of a strip of land in the city of New York, on each side of which was a public street now known as Park avenue, and that said railroad was constructed and operated in part in front of the premises described in the complaint, and admits and alleges that on or about April 1, 1873, this defendant, The New York and Harlem Railroad Company, leased to the defendant The New York Central and Hudson River Railroad Company its said railroad extending from Forty-second street, in the city of New York, through the said Park avenue to Chatham, together with all its rights therein, for the term of four hundred and one years; but for the full purport and effect of the said lease this defendant begs leave to refer to the said lease with the same force and effect as if the said lease, or a copy thereof, were hereto annexed and formed a part of this answer, and denies each and every other alle-

gation of the complaint contained in the paragraph thereof numbered "V."

6. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VI.," except that this defendant admits that under and pursuant to the directions contained in chapter 702 of the Laws of 1872, passed by the legislature of
12 the State of New York, a four-track steam railroad was constructed through the centre of the strip of land known as Park avenue, in the city of New York, and that upon the completion of the said railway structure, and for more than twenty years prior to the commencement of this action, trains of cars drawn by steam locomotives were operated upon the railroad constructed in such excavation, but denies that the portion of Park avenue occupied by said railroad structure, including the retaining walls which extended above the surface of said Park avenue, were ever subject to the plaintiff's easements, and except that it admits that under said lease the said railroad is, and has been, maintained and operated for the benefit of both defendants.

7. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VII."

8. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VIII.," except that it alleges, upon information and belief, that the defendant The New York Central and Hudson River Railroad Company intends to permanently maintain and operate the elevated railway viaduct structure erected by the board for the Park Avenue improvement above 106th street, under and pursuant to chapter 339 of the Laws of 1892, over a strip of land heretofore occupied by the said railroad constructed in the said cut or depression.

9. Denies each and every allegation of the complaint contained in the paragraphs thereof numbered "IX.," "X." and "XI."

10. Upon information and belief, denies each and every allegation of the complaint not hereinbefore or hereinafter specifically controverted or admitted.

13 Second.

For a further, second and separate defense this defendant alleges, upon information and belief, that prior to the commencement of this action, and on or about the 8th day of January, 1899, John Keirns, then the alleged owner of the premises described in the complaint herein, executed, duly acknowledged and delivered to Robert W. Cooper, a mortgage upon the premises described in the complaint herein to secure the payment of a large sum of money, to wit, the sum of $5,500, with interest, that the said mortgage was duly recorded in the office of the register of the city and county of New York; that the same remains undischarged of record, and that the owner thereof has not been made a party to this action.

Third.

For a further third and separate defense the defendant The New York and Harlem Railroad Company alleges upon information and belief:

That pursuant to the provisions of an act of the legislature of the State of New York, entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York and for other purposes," passed April 3d, 1807, and known as chapter 115 of the Laws of 1807, a map or plan exhibiting the public streets and avenues of the city of New York was duly made and filed April 1, 1811, exhibiting among other avenues, Fourth avenue, of the width of one hundred feet, extending from the southerly side of the Harlem river to and below Forty-second street.

That by the provisions of an act of the legislature, entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831, and known as chapter 263 of the Laws of
14 1831, the defendant The New York and Harlem Railroad Company was incorporated and was authorized, among other things, to construct a railroad from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, and that pursuant to the requirements of said act the defendant The New York and Harlem Railroad Company, duly located the route of said railroad and made a survey of such location and filed a map thereof in the register's office of the city and county of New York on the 22d day of October, 1831, the said map having been approved by a joint resolution of the common council, approved by the mayor, October 11, 1831, declaring their approval of the map and of the route of said railroad indicated thereon; that said railroad, as located as aforesaid, occupied a strip of land twenty-four feet in width extending from Twenty-third street to the Harlem river, the centre line of said strip coinciding with the centre line of Fourth avenue as laid down on said map, filed April 1, 1811.

That subsequently, and on the 22d day of December, 1831, the mayor approved an ordinance passed by the board of aldermen on the 16th day of December, 1831, and by the board of assistants on the 19th day of December, 1831, granting permission to said New York and Harlem Railroad Company to construct a railroad from Twenty-third street to the Harlem river, along Fourth avenue, in conformity with said map, and that said company, by articles of agreement executed January 9th, 1832, duly covenanted to perform all the conditions and requirements contained in said ordinance.

That after the incorporation of the defendant The New York and Harlem Railroad Company, and prior to the acquisition by
15 the city of New York of any title to any part of Fourth avenue, north of Forty-second street, the defendant The New York and Harlem Railroad Company acquired title in fee for the purpose of

constructing and operating its railroad thereon to a strip of land extending southerly from the southerly line of the Harlem river to Forty-second street, a portion whereof is in front of the premises described in the complaint, of the width of twenty-four feet, situate within the exterior lines of Fourth avenue, as designated on said map or plan, the centre line thereof coinciding with the centre line of said Fourth avenue, and also the right to slope any embankment or excavation of its railroad structure to the exterior lines of the said Fourth avenue; and that many years prior to the acquisition of any title by the city of New York to any part of Fourth avenue, the defendant The New York and Harlem Railroad Company, had constructed its railroad structure and had in operation its railroad upon the same, and its roadway acquired as aforesaid, and upon, along, above and below the grade of the adjacent land, and continued the operation of its railroad upon its railroad structure, as so located and constructed, until the changes required by the provisions of chapter 880 of the Laws of 1867, and by the provisions of chapter 702 of the Laws of 1872, as hereinafter set forth, were successively made.

That pursuant to the provisions of an act of the legislature, passed upon the memorial of the mayor, aldermen and commonalty of the city of New York, therefor, and entitled "An act to alter the map or plan of the city of New York," passed April 27th, 1837, and known as chapter 274 of the Laws of 1837, said Fourth ave-
16 nue was widened to the width of one hundred and forty feet, and the said widening from one hundred to one hundred and forty feet was by reason of the location and characteristics of the railroad and railroad structures theretofore built by the defendant The New York and Harlem Railroad Company, extending between Forty-second street and the Harlem river, and was for the purpose of giving an avenue of the necessary width for the increasing needs and population of the city of New York.

That the aforesaid acquisition of title by said defendant, The New York and Harlem Railroad Company, with the right to slope any embankment or excavation for its railroad structure to the exterior lines of said Fourth avenue, at that time one hundred feet in width as aforesaid, and the aforesaid construction by this defendant The New York and Harlem Railroad Company, of its railroad structure, and the aforesaid operation of its railroad upon the same and its roadway, was many years prior to the alleged acquisition by the plaintiff of title (if he acquired any title) to the premises described in the complaint, and to the erection of any building or buildings on said lands, and such acquisition of title, right of construction and operation of said railroad was pursuant to and by authority of said act of incorporation of said defendant The New York and Harlem Railroad Company, and of the acts amendatory thereof and supplemental thereto, and with the consent and acquiescence of the predecessor or predecessors in title (if the plaintiff has any) of the plaintiff.

That pursuant to the provisions of section six of an act of the legislature entitled "An act to amend an act entitled 'An act relating to the New York and Harlem Railroad Company,' passed May 7, 1840, and the acts amending the same," passed March 29th, 1848, and known as chapter 143 of the Laws of 1848, the New
17 York and New Haven Railroad Company (now known as the New York, New Haven and Hartford Railroad Company), a railroad corporation organized under the laws of the State of Connecticut, acquired from said defendant The New York and Harlem Railroad Company, the right to run the cars of the said New York and New Haven Railroad Company upon the tracks of said defendant The New York and Harlem Railroad Company, from a point of junction near Williams bridge, to and into the city of New York, and did, and ever since the year 1848 has, run its cars and trains upon the railroad of said defendant The New York and Harlem Railroad Company, from said point of junction to and along and upon said tracks from the southerly side of the Harlem river to Forty-second street.

That by proceedings instituted by the mayor, aldermen and commonalty of the city of New York, in or about the year 1850, for the opening of Fourth avenue (now known as Park avenue) from Thirty-eighth street to the Harlem river, resulting in an order of confirmation entered October 29th, 1853, the said city assumed to acquire title to the land between the exterior lines of Fourth avenue from Thirty-eighth street to the Harlem river, subject, nevertheless, to all the rights of the defendant The New York and Harlem Railroad Company, to maintain and operate its said railroad in said avenue.

That on the 10th day of May, 1867, the legislature passed an act entitled "An act for the protection of persons traveling upon Fourth avenue in the city of New York," and known as chapter 880 of the Laws of 1867, which in terms required and provided that the defend-
ant The New York and Harlem Railroad Company should
18 do certain work and perform certain acts, and among other things, that it should erect retaining walls upon the sides of its railroad below Ninety-second street, and between Seventy-eighth and Eighty-eighth streets, surmount said retaining walls with iron railings, and arch over its roadway from Eighty-eighth street to Ninety-second street, and that the city of New York should pay to the defendant The New York and Harlem Railroad Company one-half of the expense thereof, and that the filling in and grading about the said arch should be done by the city of New York, at its sole expense; and this defendant alleges that all the work and acts required to be done by said last mentioned act were duly performed.

That on the 14th day of May, 1872, the said legislature passed an act entitled "An act to improve and regulate the use of Fourth avenue in the city of New York" and known as chapter 702 of the Laws of 1872, whereby an established statutory grade and roadway between

Forty-fifth street and the Harlem river were provided for the said railroad of the defendant The New York and Harlem Railroad Company, and whereby said defendant was required to construct such viaducts, foot and road bridges over the same and such excavations and tunnels under the same, with openings for proper ventilation, as should be required by the plans and specifications of a board of engineers appointed by said act to execute, direct and superintend the said improvement; and also requiring one-half the cost of said improvement to be paid by the city of New York. That said improvement was accordingly carried out and the requirements of said act fully complied with and the railroad structure mentioned in the complaint as existing in front of the premises described in the complaint prior and up to the month of April,
19 1893, was constructed and has since been maintained and operated by the defendants pursuant to said last mentioned act.

That on the first day of April, 1873, said defendant The New York and Harlem Railroad Company leased all of its railroad from Forty-second street northwardly to the defendant The New York Central and Hudson River Railroad Company for a term ending April 1st, 2274, and that the said defendant The New York Central and Hudson River Railroad Company entered into possession and is now in the sole occupation and enjoyment of the said demised premises.

That on the 19th day of April, 1892, the said legislature passed an act entitled, "An act to regulate, improve and enlarge Park avenue above 106th street, in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridges, and for other purposes," and known as chapter 339 of the Laws of 1892; that said act was duly amended by an act of said legislature, passed May 8th, 1894, and known as chapter 548 of the Laws of 1894, and was also further amended by an act of said legislature passed May 13th, 1896, and known as chapter 594 of the Laws of 1896.

That under and pursuant to the provisions of section 13 of said act, chapter 339 of the Laws of 1892, the board therein designated as "the board for the Park Avenue improvement above One
20 hundred and sixth street," was duly appointed by the mayor of the city of New York, on or prior to the 29th day of April, 1892, was duly organized as required in said act on that date, and thereupon proceeded to and took entire charge and control of the improvement directed in said act, and still has entire charge and control of the same; that pursuant to the authority vested by said act as amended as aforesaid, and in obedience to its explicit directions, the said board entered into and executed certain

contracts with various parties for the construction and carrying out of said improvement, according to certain plans prepared by said board, approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, and that all the structures described in the complaint, including all temporary structures, required in the construction of said improvement, or necessary for the operation of trains during the making of said improvement, have been erected by such contractors under the sole supervision and control of said board, and in part at the expense of the mayor, aldermen and commonalty of the city of New York, as required by said act as amended as aforesaid, and that all the provisions of said chapter 339 of the Laws of 1892, as amended, have been and are being duly carried out and executed.

That all the changes in the original railroad bed and structures of the defendant The New York and Harlem Railroad Company, which have been or are being made, including all temporary structures, were and are necessary and requisite in order to carry out the provisions of the said acts, and were necessary and required for the purpose of and in order to regulate, improve and enlarge Park avenue in accordance with the provisions of the said acts, and that the defendant The New York and Harlem Railroad Company, has not operated any trains on said structure,
21 or any part of it, temporary or otherwise.

Fourth.

For a further fourth and separate defense the defendant The New York and Harlem Railroad Company alleges, upon information and belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court.

Fifth.

For a further fifth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to his predecessor or predecessors in title within twenty years next preceding the commencement of this action.

Sixth.

For a further sixth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to his predecessor or predecessors in title within ten years next preceding the commencement of this action.

Seventh.

For a further seventh and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein
22 or to his predecessor or predecessors in title within six years next preceding the commencement of this action.

Eighth.

For a further eighth and separate defense the defendant The New York and Harlem Railroad Company alleges:

That it entered into possession of that part of Park (formerly Fourth) avenue in front of, or adjacent to, the premises claimed to be owned by the plaintiff, which is now and heretofore has been occupied by the railroad and railroad structure of the defendant The New York and Harlem Railroad Company, under a claim of title, exclusive of any other right, founding such claim upon a written instrument or instruments as being a conveyance or conveyances of said premises or of the right, franchise and easement to construct, maintain and operate railroads thereon, and that there has been a continued occupation, possession and use of the said franchises, rights and easements included in said written instrument or instruments, or of some part thereof, by the defendant The New York and Harlem Railroad Company, and the defendant The New York Central and Hudson River Railroad Company, under said lease, for twenty years next preceding the commencement of this action, under the same claim.

Wherefore, the defendant The New York and Harlem Railroad Company demands that the complaint be dismissed, with costs.

FRANK LOOMIS,
Attorney for the Defendant, The New York
and Harlem Railroad Company.

Office and post-office address, Room 10, Grand Central depot, 42d St. and Vanderbilt Ave., New York city, N. Y.

23 CITY AND COUNTY OF NEW YORK, ss:

Edward V. W. Rossiter, being duly sworn, says that he is the treasurer of The New York and Harlem Railroad Company, the above-named defendant; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 1st day of Nov'r, 1897.

H. B. DWYER,
Notary Public, New York County.

The separate answer of the New York Central and Hudson River Railroad Company contains substantially the same allegations as the separate answer of the New York and Harlem Railroad Company.

24 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and The New York Central & Hudson River Railroad Company, Defendants. } Decision.

The issues in the above-entitled action having heretofore duly come on for trial before the Hon. Frederick Smyth, one of the justices of this court, on the 7th day of May, 1900, and the respective parties having appeared, and the cause having been duly tried and decision reserved, and the said justice having thereafter died, leaving the cause undetermined, and the same thereafter regularly coming on for trial before the Hon. Abraham R. Lawrence, one of the justices of this court, on the 5th day of November, 1900, and the respective parties having thereupon upon said trial duly stipulated in writing and in open court that the case be submitted for decision to the said justice upon the evidence as appearing in the stenographer's minutes of the testimony, and upon the exhibits used and put in evidence upon the said former trial before Mr. Justice Smyth, and upon the complete record of said trial, with the same force and effect as if the said justice then presiding had presided at the
25 time of the former trial, and that all said evidence and testimony was to be considered as being taken before said trial justice *nunc pro tunc*, as of the date of May 7th, 1900, and the submission having been made and the second trial having been had accordingly, and the said original records, exhibits, evidence and testimony having been duly read and submitted, and the same having been duly considered,

Now, therefore, I, said Abraham R. Lawrence, trial judge, do make this decision, stating concisely the grounds upon which the issues herein are decided, as follows:

First. The plaintiff is, and since April 12, 1882, has been the owner and in possession of the premises described in the complaint, and situated on the southeast corner of Park avenue and 114th street, having a frontage of 100 feet and 11 inches on said avenue, and has had during the period of his ownership, as aforesaid, certain easements of light, air and access in Park avenue and appurtenant to his said premises.

Second. During all the times herein mentioned the defendant The New York & Harlem Railroad Company was the owner of the railroad and railroad structures in Park avenue in front of the

plaintiff's premises, and the defendant The New York Central & Hudson River Railroad Company was at all such times the lessee of said railroad and structures under a lease, dated April 1st, 1873, for a period of 401 years from said date.

Third. Said railroad prior to August, 1894, was operated along the centre of said avenue, in front of the plaintiff's premises, on a masonry embankment or viaduct about 3 feet high and about
26 56 feet wide, and bounded on both sides by parapet walls of stone, having a height of about 5 feet above the surface of said avenue.

Fourth. The said defendant railroad companies, under and by virtue of the charter of the defendant, The New York & Harlem Railroad Company and the acts amendatory thereof and supplemental thereto, the various resolutions, consents, ordinances and acts of the mayor, aldermen and commonalty of the city of New York, the proceedings taken by the mayor, aldermen and commonalty of the city of New York, commenced in 1850 and consummated in 1853, the various acts of the legislature upon which said proceedings were taken to open Fourth (now Park) avenue from 38th street to 135th street, chapter 702 of the Laws of 1872, and the acts performed by the defendants thereunder; the lease of the New York & Harlem Railroad Company to the New York Central & Hudson River Railroad Company, dated April 1st, 1873, and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or his predecessors in title, acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894, as hereinbefore described.

Fifth. In compliance with and pursuant to chapter 339 of the Laws of 1892, and under the supervision of the board for the Park Avenue improvement above 106th street, the masonry embankment or viaduct structure aforesaid was removed and a new permanent viaduct railroad structure of iron and steel was erected in the
27 place thereof by and for the use of the defendant railroad companies, said structure being about thirty-five feet high by about fifty-six feet in width.

During the said time, from October 1st, 1894, to September 6th, 1897, the trains of the defendant The New York Central and Hudson River Railroad Company were operated upon temporary structures or trestles erected partly over said embankment or viaduct and partly between the same and the curbline of said Park Avenue roadway and occupying said roadway between plaintiff's premises and said old viaduct or embankment. The existence of the temporary structure in said roadway in front of plaintiff's premises and the operation of trains thereon after October 1st, 1894, deprived the plaintiff of a portion of the light, air and access appurtenant to said premises, to which he was entitled.

The defendant, The New York Central and Hudson River Rail-

road Company began to operate its trains on the permanent structure on February 16th, 1897, and has since continued the same, and intends to permanently continue said operation, and the said permanent structure and the operation of trains thereon, are and since February 16th, 1897, have been a continuous trespass upon plaintiff's easements of light and air appurtenant to said premises and interference therewith and deprivation thereof.

Sixth. Defendants are not liable for any damage caused plaintiff by the mere construction of the temporary or permanent structures or anything incident thereto, but only for the increased damages caused by the maintenance of said structures and operation of the railroad.

Seventh. The rental value of said premises was depreciated in the period from September, 1894, down to and including May 7th, 1900, in the sum of $1,296, below what said rental value would
28 have been during said period if the change in defendant's said railroad in Park avenue in front of said premises, pursuant to chapter 339 of the Laws of 1892, had not been made; and the fee value of said premises has been and was on May 7th, 1900, depreciated in the sum of $2,525 below what said fee value would have been on said date if there had been no such change in defendant's railroad as aforesaid, taking into consideration in each case all benefits conferred by said changes.

The plaintiff is entitled to judgment as follows:

(1.) To a money judgment against the defendants for the sum of $1,296 with interest thereon from May 7th, 1900, to the date of the entry of judgment.

(2.) To an injunction restraining the defendants from the further maintenance and operation of the said viaduct structure and railroad in front of the plaintiff's premises on the southeast corner of Park avenue and 114th street above mentioned, but said injunction shall not be operative until thirty days after notice of entry of judgment herein, and if during the said period the defendants shall pay or tender to the plaintiff the sum of $2,525 and interest thereon from May 7th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated and to receive from plaintiff a proper grant and conveyance of such right, together with a release or releases of all claims for damages on account of the maintenance and operation of said viaduct structure and railroad since May 7th, 1900, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.
29 In case the defendants do not within such time acquire the right as against the plaintiff, as owner of said premises, to maintain and operate their viaduct structure and railroad, the injunction shall become operative.

I direct the entry of a judgment as above, with costs of the

action to the plaintiff, and with an extra allowance of one hundred and twenty-one dollars.

Dated New York, January 14, 1901.

ABRAHAM R. LAWRENCE, J. S. C.

(Endorsed:) "Filed January 18, 1901."

30 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK and HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Judgment.

The issues in the above-entitled action having been regularly brought on for trial before the Hon. Abraham R. Lawrence, justice, at a special term of this court, held on the 5th day of November, 1900, and said justice having made and filed a decision directing judgment in favor of the plaintiff and against the defendants, as hereinafter stated, and the plaintiff's costs having been duly taxed at the sum of $289 10/100,

Now, on motion of Atwater & Cruikshank, plaintiff's attorneys, it is adjudged,

I. That the plaintiff, John Keirns, recover of the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of $1,296, as damages for the trespasses of the defendants upon the premises on the southeast corner of Park avenue and 114th street, New York city, for the period from September, 1894, down to May
31 7th, 1900, with interest thereon from May 7th, 1900, to the date of the entry of this judgment, amounting to the sum of $54.22; also the sum of $289 10/100 for the plaintiff's costs in this action, amounting in all to the sum of $1,639 32/100, and that plaintiff have execution therefor.

II. That the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of their viaduct structure and railroad in front of the plaintiff's premises on the southeast corner of Park avenue and 114th street, but said injunction shall not be operative until thirty days after notice of entry of judgment herein, and if during said period the defendants, or either of them, shall pay or tender to the plaintiff the sum of $2,525, and interest thereon from May 7th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated, and to receive from plaintiff a proper grant and conveyance of such right, together with a release or releases of all claims for damages on account of the maintenance and operation of said structure and rail-

road since May 7th, 1900, the day of the trial of this action, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.

In case the defendants do not within such time acquire the right as against the plaintiff, as owner of said premises, to maintain and operate their structure and railroad, the injunction shall become operative.

III. Any and every tender of delivery, notice or payment herein provided for shall be made by or to the attorneys for the respective parties.

IV. Every party to this action shall have leave to move at the foot of this judgment for further direction.

32 V. No execution shall issue upon the money judgment herein until thirty days after the notice of entry of judgment.

Dated New York, January 18, 1901.

(S'd) ABRAHAM R. LAWRENCE, J. S. C.

WILLIAM SOHMER, Clerk.

(Endorsed:) "Filed January 18, 1901."

33 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff, *against* THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants.	Exception to Decision.

Please take notice, that the defendants, and each of them, hereby except to the decision filed herein on the 18th day of January, 1901, and to each and every part of the same.

Dated borough of Manhattan, New York city, January 24, 1901.

Yours, &c., IRA A. PLACE, Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, New York city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, N. Y. city, N. Y.

34 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants.

Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the 18th day of January, 1901, and from each and every part of said judgment.

Dated New York, January 24, 1901.

Yours, &c.,

IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, New York city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, borough of Manhattan, New York city, N. Y.

35 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and THE NEW York Central & Hudson River Railroad Company, Defendants.

STATE OF NEW YORK,
County of New York, } *ss.:*

John A. Mattison, being duly sworn, deposes and says: That he is an attorney in the office of Ira A. Place, attorney for the defendants in the above-entitled action; that he — familiar with said action, and that no written opinion was given by the court at special term, other than the following memorandum, which appeared in the *Law Journal* of December 21, 1900:

"LAWRENCE, *J.*:

In this case I find that the plaintiff has sustained damage in the rental value of his property in the sum of $1,296, and in the fee value in the sum of $2,525. Draw decision and judgment according, with costs to the plaintiff and settle on three days' notice."

JOHN A. MATTISON.

Sworn to before me this 14th day of March, 1901.

ALBERT B. QUENCEY,
Notary Public, New York County.

36 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

The issues thus joined by the pleadings herein were tried before the Honorable Frederick Smyth, justice, at a special term, part IV., without a jury, on the 7th day of May, 1900. Justice Smyth having died without rendering any decision in the case, the same was, by consent of both parties, submitted to the Honorable Abraham R. Lawrence, justice, upon the record made upon the trial before the Honorable Frederick Smyth, to decide with the same force and effect as if tried before him.

Alfred B. Cruikshank, Esq., and J. E. C. Thomson, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

It is admitted that this action was begun on September 23d, 1897.

Plaintiff's counsel offered in evidence original deed from Hannah R. Van Vechten to John Keirns, dated April 12th, 1882, and
37 recorded April 13th, 1882, in Liber 1660 of Conveyances, page 68, in the register's office, New York county, the expressed consideration being $9,350, conveying the premises in question by the description set out in the complaint.

Received and marked Plaintiff's Exhibit A.

Plaintiff's counsel offered in evidence abstract of chain of title of the plaintiff to the premises in question, commencing with the title of Peter Benson, who died seized of a large tract of land at Harlem known as the Third Avenue tract, in the year 1882, leaving a will and so on, as stated in the abstract. The deeds and papers stated in the abstract are considered in evidence.

Abstract received and marked Plaintiff's Exhibit B.

The foregoing Exhibits A and B are not printed in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so printed. In the event of their non-production they shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence a map produced from the register's office, filed therein November 12th, 1828, as number 115, entitled "Map of the Third Avenue tract, formerly the property of

B. P. Benson and Dr. Van Arsdale," and marked "Surveyed September 25th, 1825, by J. F. Bridges, New York."

Received and marked Plaintiff's Exhibit C.

The foregoing Exhibit C is not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so
38 reproduced. In the event of its non-production it shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence the description contained in the deed from Benjamin L. Benson to Archibald Watt, referred to in the abstract, dated November 12th, 1828, recorded the same day in the register's office, New York county, Liber 241 of Conveyances, page 497, conveying "all those certain lots, pieces or parcels of land situate, lying and being in the twelfth ward of the city of New York, and known and distinguished on a certain map made of the lands of said Benjamin L. Benson by J. F. Bridges, city surveyor, bearing date September 25th, which map is now on file in the street commissioner's office in the city of New York, by the numbers and boundaries hereinafter mentioned. Also all that certain piece of land bounded as follows: Westerly by the Fourth avenue, easterly by a line drawn parallel to the Fourth avenue on the easterly side thereof and distant 400 feet therefrom, northerly by 114th street, and southerly by 113th street, which boundaries include lots numbered on said map as follows: 786, 787, 788, 789, 790, 791, 792, 793 and so on up to and including 817.

Received and marked Plaintiff's Exhibit D.

By PLAINTIFF'S COUNSEL: The premises in question include parts of lots 802 and 805 in that description.

Plaintiff's counsel offered in evidence chapter 115 of the Laws of 1807, which provided for laying out of the streets, including Fourth avenue, in the city of New York.

Received and marked Plaintiff's Exhibit E.

The foregoing statute is not printed in this case on appeal,
39 but may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence a copy of a map entitled "Map of the city of New York by the commissioners appointed by an act of the legislature passed April 3, 1807," showing Third, Fourth and Fifth avenues from 113th street to 121st street, and including the premises in question.

Received and marked Plaintiff's Exhibit F.

The foregoing Exhibit F is printed in the appendix to this case on appeal.

Plaintiff's counsel offered in evidence chapter 86 of the Laws of 1813, particularly section 178, which provides for the laying out of streets, including Fourth avenue.

Received and marked Plaintiff's Exhibit G.

The foregoing statute is not printed in this case on appeal, but

may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence deed from Benjamin L. Benson to the mayor, aldermen and commonalty of the city of New York, dated November 19th, 1825, recorded December 6th, 1825, in Liber 196 of Conveyances, page 261, conveying certain strips of land laid out as streets on the map of the city of New York, and among others Park (formerly Fourth) avenue, of the width of 100 feet in front of the premises in suit, the land conveyed being more particularly described as "all those parts of the tracts, pieces or parcels of land heretofore conveyed to the said party of the first part over which the Fourth avenue and 115th street run, pass or ex-
40 tend, as said avenues or streets are laid out by the commissioners of streets and roads in the city of New York, under and by virtue of the act entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes,' passed April 3d, 1807, together with all and singular," &c., "To have and to hold all and singular the said pieces or parcels of land hereditaments and appurtenances, and every part and parcel thereof, doth in and by these presents release and confirm unto the said parties of the second part and to their successors, to the only proper use and behoof of the said parties of the second part and their successors forever in trust, however, that the same be appropriated and kept open as parts of public streets and avenues forever in like manner as the other public streets and avenues in the said city are and of right ought to be, provided, nevertheless, and these presents are upon the express condition that nothing herein contained shall be construed to deprive the said party of the first part of the right in or property to the timber, trees, houses and other buildings and improvements standing, being and upon the pieces or parcels of land herein and hereby conveyed, or to prevent him, the said party of the first part, his heirs or assigns from appropriating the same to his or their own proper use and behoof upon the opening of the said streets and avenues whenever the said parties of the second part or their successors shall think fit to direct by resolution from time to time that any of the said streets or avenues be opened. And the said party of the first part for himself, his executors, administrators and assigns, doth covenant, grant,
41 promise and agree to and with the said parties of the second part and their successors, that he, the said party of the first part, his executors, administrators and assigns, shall and will, with all convenient speed after the execution of this instrument, at his and their own proper cost, charges and expense, cause the said Fourth avenue so far as the same extends over the said premises to be opened, and will make the same passable for horses, carriages, cattle and foot passengers, in the same manner and with the same degree of convenience as good country roads are passable."

Objected to by defendants' counsel as incompetent, immaterial and

irrelevant, as being no evidence of the opening of Park avenue as a street.

Objection overruled. Exception to defendants.

Received and marked Plaintiff's Exhibit H.

Plaintiff's counsel offered in evidence chapter 274 of the Laws of 1837, which provided for the widening of Park avenue, formerly Fourth avenue, to the width of 140 feet.

Received and marked Plaintiff's Exhibit K.

The foregoing statute is not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence petition, verified April 15th, 1850, in the proceedings entitled, "In the matter of the application of the mayor, aldermen and commonalty of the city of New York, relative to the opening of Fourth avenue from 38th street to the northerly line or side of 135th street, in the Twelfth and
42 Eighteenth wards of said city," and having attached affidavits showing the publication and posting pursuant to law.

By DEFENDANTS' COUNSEL: I take it that is offered for the purpose of showing the addition of 20 feet on each side of the avenue, and for no other purpose.

By PLAINTIFF'S COUNSEL: Yes.

Received and marked Plaintiff's Exhibit L.

The foregoing Exhibit L is not printed in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so printed. In the event of its non-production it shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence rule for the appointment of commissioners of estimate and assessment in the same proceeding, appointing Samuel Jones, John M. Pickney and Richard J. Smith, commissioners, filed April 22, 1850.

Received and marked Plaintiff's Exhibit M.

Plaintiff's counsel offered in evidence the oath of said commissioners, filed April 23, 1850.

Received and marked Plaintiff's Exhibit N.

Plaintiff's counsel offered in evidence order of the special term confirming the report of the commissioners in this proceeding, filed November 15, 1853.

Received and marked Plaintiff's Exhibit O.

Also order of the general term affirming order of the special term in the same proceeding, filed June 20, 1854.

By DEFENDANTS' COUNSEL: I object to the order of the special term on the ground that it is not the best evidence.

43 It is admitted that the report of the commissioners in that proceeding is not on file.

Objection overruled. Exception to defendants.

Received and marked Plaintiff's Exhibit P.

The foregoing exhibits—M, N, O and P—are not printed in this case on appeal, but may be produced and used on any appeal herein by either party with the same force and effect as if so printed. In the event of their non-production they shall be deemed sufficiently described above.

Plaintiff's counsel offered in evidence portion of damage map made in that proceeding, showing this property and showing the widening of Fourth avenue at this point.

Received and marked Plaintiff's Exhibit Q.

The foregoing Exhibit Q is printed in the appendix to this case on appeal.

It is admitted that the temporary structure referred to in this case was commenced in August, 1894, and that trains began running on the temporary structure in September, 1894.

It is also admitted that the operation of trains on the permanent structure began February 16, 1897.

Plaintiff's counsel offered in evidence plan showing the temporary structure of the railroad.

Received and marked Plaintiff's Exhibit R.

Plaintiff's counsel offered in evidence a map showing a comparative plan of the present permanent structure and the ground plan of the structure under the act of 1872.

Received and marked Plaintiff's Exhibit S.

The foregoing Exhibits R and S are printed in the appendix
44 to this case on appeal.

JOHN KEIRNS, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am the plaintiff in this action, and I own the property described in the complaint, at the corner of 114th street and Fourth avenue. I bought that property in 1882 and paid nine thousand and some hundred dollars for it. The description mentioned in the deed is correct; that was in cash. At the time I bought the property there was a house on it, but it was unfinished. There was quite some work to be done in order to finish it. It cost in the neighborhood of $3,000. It was a three-story and basement brick house and the roof was on. The inside work was not completed. I did the plumbing, I put in the gas fixtures, I had the top floor plastered—the top floor was not finished. I put in bath-tubs along with the plumbing, wash-basins, &c., that was necessary on each floor. I put in a sewer, from the main sewer in the street to the rear of the building; I built a brownstone stoop, with iron railings, in the front. I flagged 100 feet on Fourth avenue and in front of the house, which amounted to something like 17 feet and some inches. The stairs were all up, the trim in the hall was not done and the parlor floor was not completed. I had to finish the trim on the inside.

Q. Was anything done in the yard?

A. Yes, sir; I had a door opening, an iron cellar door in the yard, from the rear of the house, the south end of the house—an opening doorway in the yard and stairs going up from the basement to the yard, which is there yet. I put on all the rear shutters of the house, as there was not any on; I put plumbing all through the
45 house, and range and copper boiler and gas fixtures. At that time I put the house in good condition, but it took quite a while to do it. I have owned the house ever since.

Q. In what condition is the house now as to repairs?

Objected to by defendants' counsel as calling for the conclusion of the witness.

By the COURT:

Q. How is the house now? Is it in good tenantable condition?

A. It has not been for some time. I say it is not in good tenantable condition from the fact that you cannot keep anything in the place. You cannot hoist a window or anything; you cannot hang out your clothes without their getting dirty and filthy. I refer to the operation of the road. The house is fairly good—as good as most any house. It looks all right on the inside, of course; it is in good repair. I have not heard any complaints.

I remember when the present structure was erected and know the year, and I owned the house at that time. They began to put up the temporary structure in 1894; I remember the structure that was there before. I do not live in this house; I have visited the house frequently; as a rule, about once a month. Sometimes I go there to collect the rent.

I have observed the operation of the defendants' railroad, and I took such observation before the present structure. In 1894 the railroad ran almost on the surface or a little higher than the surface of the street, and there was a large wall of masonry, a strong wall, built there, I think, with granite blocks. The wall was probably six feet high, and there was an iron railing on the top of it. The roadbed was a solid stone roadbed. The present structure is all built of iron that I saw.

In regard to the effect of the running of trains, I observed
46 that the noise is much greater than it was with the old roadbed; I also observed the smoke, which is intense there; on some occasions, when the wind blows it comes into your floor and rooms; and also cinders. There is no day in the year that you can't get a barrel of cinders on the roof, or very near a barrel. Those cinders come from the locomotive. The bed of the structure is a little higher, I think, than the parlor floor.

Q. State if there is any vibrations. As the trains pass do you notice any vibration to your house?

Objected to by defendants' counsel as immaterial and irrelevant and not within the pleadings.

Objection overruled. Exception to defendants.

A. I do. I know what vibration is. I never observed that there was vibration when the trains ran on the old solid structure.

I am getting $40 a month rent for the premises.

When I bought the premises in June, 1882, they were not occupied. I let them when I put the house in shape—finished it. It took me all summer to complete it, and I think I did not let it until along about October, 1882. The first tenant's name was Varley, and I got $65 a month rent. Mr. Varley stayed there one year. After that the rent was $65 for something over a year. Then I let it to a builder; he lives on the block yet. He paid me $65 a month, and stayed there something over a year. Mr. Lambert was the next tenant, and he is the present tenant. Mr. Lambert went in there between three and four years after I had it occupied—about 1887, I think. He paid about $55 a month, and continued to pay that up to 1894, which was the time that they began to erect the temporary structure, and then I got no rent at all for one year and a
47 month. I got no rent from January, 1895, to January, 1896. In January, 1896, I got $25 a month rent for the entire building; now I get $40 a month, and I think I have been getting that for going on three years.

I can describe fairly well the temporary structure which was erected there in 1894. The uprights were large wooden columns, and the sleepers rested on that overhead; they dug up the pavement on the avenue and sunk these girders about eight feet apart close up to the sidewalk, that is, the ones towards the east curbstone, they were close to the gutter; and they tore up more than one-half of the paving-stones along the avenue while doing that; then later on, when they got to working there, they had wooden uprights put up. I inquired what that was for, but I could not learn or ascertain what the partition was up for; by partition I mean fence. (Showing photographs to witness.) Those photographs represent the temporary structure.

Photographs offered in evidence by plaintiff's counsel.

Received and marked Plaintiff's Exhibits T and U.

The foregoing exhibits are not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein with the same force and effect as if so reproduced. In the event of their non-production they shall be deemed sufficiently described above.

The building faces the west, the end of the building, the front faces north and the rear faces south. The house fronts on the street, and runs 100 feet on the avenue in depth. I think there are eleven windows fronting on the street looking north, and I think there are five windows on the side fronting on the avenue, and a bay window, may be more; I can't tell now. These photographs show
48 that fence or partition I spoke of. These photographs were taken, as near as I can recollect, in 1895, at the time the men were doing this work. The temporary structure went over the side-

walk near my house. There is an iron railing between my house and the sidewalk, which is about four feet and six inches from my house. This structure must have been sixteen feet from the side of my house; that is as near as I can get at it, but taking it to the bay window, it would not be over twelve feet; the bay window is on the west side of the house, and projects four feet and some inches from the building line.

They are running trains on this road constantly night time, as well as day time, but I don't know how many trains are running.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I live at 145 East 120th street, this city. I have been over in the night time at my house on Park avenue, sometimes earlier, sometimes later; I never was there later than eleven o'clock that I know of. I have seen trains running on that structure later than eleven o'clock within a month; I don't know what date it was.

Q. What time of night was it?

A. Probably nine o'clock, between nine and ten, I was on 125th street. Trains were running on the temporary structure when these photographs were taken. I think the fence that is shown in the photograph was right up to the curb. The place shown south of the lamp post is the place where the cars ran on the temporary structure. They did not curve off; they ran straight up and down the avenue. The lamp-post is close to the curb, and going that way is going south, but there is no turn there of the railroad—that photograph ends at that lamp-post.

49 Q. Isn't it a fact that the structure shown here, the one nearest your house on the west, was a sidewalk for trackwalkers?

A. There was no where else for the trains to run but there. I know there was a small walk for the employees of the railroad company to walk on between my house and the track.

I have no agent for this house; I act as my own agent and I never employed one; I tried to rent it when I was getting no rent. I am not now a real estate man. I live on a farm now occasionally during the summer, and my business now is that of a farmer; before that I was a policeman.

I fixed the rent at $40 a month for these premises, and I also fixed the rent at $25 a month and at $55 a month. Mr. Lambert is my tenant now, and I made the agreement of hiring with him. The highest rent he paid was $55 a month. I made the agreement that he should not pay me any rent from 1895 to 1896. The house was not empty during the time I did not collect any rent from it; the same family lived in it.

(By the COURT:)

Q. Why didn't you collect rent from that family?

A. They were going to move out, and I had to persuade Mr.

Lambert to have his wife remain to save me from hiring a watchman, and they agreed to stay there and take care of the premises, and I let them stay there without rent, so that they would look after the property. The first rent I got for this property was $65 a month, and I think I got that for a little over two years. I put it down from $65 to $55 because it was an unusual season of the year I commenced; it was along in the fall when Mr. Lambert moved in and houses were not letting very good, and I thought $55 was better from a good tenant than $65 from a poor one; I never attempted to raise the rent on him from the time he went in until he
50 stopped paying rent altogether; he never asked me to lower it.

I have seen cinders coming from the locomotives over to my house from daily trains they operated there; I did not notice how the locomotives or trains were marked. If the wind blows that way, smoke will come into my house; but if there is no wind, it don't go there. I have been on the roof with a painter when it was hard work to stand on it; there was wind then. I think there is more smoke and more cinders now than when the old structure six feet high was there. There is much more noise now from the present structure than there was from the old structure. I have been there within a month, but I did not notice any train going by at that time; I heard it; I am pretty sure that there was more noise from that than there was from the old structure. I think the noise now is about the same as it was a year ago. I can hear just as well now as I could a year ago.

Redirect examination—In answer to PLAINTIFF'S COUNSEL:

I made an effort myself to rent these premises, and I am collecting all the rent I can get.

KATE LAMBERT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mr. Keirn's house at 114th street and Fourth avenue, and have lived there since October 17, 1884; I have certainly noticed the effects from the operation of the defendants' railroad in front of these premises. I have observed trains passing up and down, a great many of them; there was smoke.

51 Q. Anything else?

A. You mean at the present time?

Q. Yes, and before?

A. It jarred the house to such an extent that all the walls were cracked.

Defendants' counsel moved to strike out the answer as not within the issues, because vibration is not made an element of damage.

Motion denied. Exception to defendants.

In answer to PLAINTIFF'S COUNSEL:

Q. Go on and state what else there was?

A. The windows were jarred, we could not hear ourselves speak, persons sitting in the room could not understand each other talking while the windows were open, particularly when the trains were passing in the morning, from half-past six until about nine, and from five until seven in the evening they were constantly going by, back and forth, sometimes four trains at a time. I mean four trains, two on each side of the structure; then it was impossible to hear each other speak; we had invariably to put the windows down; when I had the windows up, when the wind was blowing in the direction of the house we would get the cinders; they would go down in the area, on the roof of the extension and on the roof of the house also; I have invariably swept them off the roof. On the inside of the house it is very bad from the smoke and the cinders; it comes on our furniture and carpets and on the window-sills if the windows are closed, and I have the windows closed regularly to prevent all the dirt coming into the house; there is dust. I hear the noise of the trains and on our side two trains can pass. I notice the trains begin running in the morning around six o'clock; they run very frequently from that time until about nine o'clock, and in the
52 evening about five o'clock they commence running frequently, and from that time on until about seven o'clock, they seem to lessen the number after that.

I never counted the number of cars there were on the trains; there were sometimes four, sometimes more. These trains are propelled by steam locomotives.

I have noticed this noise and the dust and cinders since I have lived there.

I remember the old structure that was there on the surface of the street. There was always just the same noise, dust and cinders from the old structure as from the present one; the cinders come down with greater force against the house from the present structure, it being so much higher. It was opposite the parlor window before, now it is up opposite the fourth story; the train itself would be on a line with the fourth story. As the cars go by you can see the people sitting in them, not the top of the cars. The cars do not run much higher as to the living rooms of the house than they did before; when the wooden structure was there they did. The wooden structure was about on a level with the parlor windows; I mean by that that the side of the cars was about on a level with the parlor windows—you could see the passengers in the train. The passing of the trains past the windows affects the light in the parlor now, the rays of the sun don't come in as they used to; the light is not as bright as it was. When the cars are passing up and down in front of the windows it does not affect the light in the front but on the side, looking out on the track. I see the flash of the train passing only on the parlor floor.

Q. When you said the noise was as great in the former structure as it is now, did you mean the temporary structure, the wooden
53 structure, that *that* they had up there.

A. The temporary structure I had simply to keep my windows closed at the former time, but the temporary structure was simply unbearable.

Defendants' counsel objected to the answer.

Q. Why was it unbearable?

A. The noise came right in the windows; of course the condition of the place was altered terribly; water poured into the cellar from the structure, it was right up to the curb-stone, and the water poured right down to the cellar; I called one of the men off the road and they would come down and see the condition of the cellar, and he told me to sue the Central road, they could stand it.

Defendants' counsel objected to the latter part of the answer and moved to strike it out.

This water came from the temporary structure they had erected; the structure was a wooden structure, they erected it for the trains to run on, they had to take up the stone and put the beams against the curb-stone, which jarred the house and caused the water to run down the cellar. This water came from the street when it rained, instead of going through the gutter it would come down into the cellar. It came into the cellar from the side, the foundation was all broken. I called their attention to it and that was the answer he made me.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

This water came into the cellar every time it rained, the year the structure was there, which I believe was 1895. It has ceased to come in since they fixed it, which I believe was the year after they removed the structure—1897, I suppose. The water came into the cellar all the time the temporary structure was there.

54 CHARLES L. LAMBERT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mr. Keirn's house, and have lived there since October, 1884. I think there are ten rooms in that house and a bath room. The interior of the house is in fair repair from the landlord's standpoint. I went in there 16 years ago in October; that was in 1884. I first paid $55 a month rent and continued to pay that up to January, 1895. When I went in there the railroad in front of the premises was on a solid foundation. I remember the structure at that time. In 1894 the temporary structure was put up, but I cannot

say of my own knowledge how long that temporary structure continued, but it was a year or more. I did not pay any rent in 1895, because I threatened to move out. I told the landlord that I could not stay there as my wife objected to remaining there under the present condition, and we had some talk about it for a month or two before the first of January, and finally I told him I would move on the first of January; I would not pay any rent. Then he suggested to me that I stay there a while until things got better, and I could stay there without paying any rent. In 1896 the temporary structure may have been there, I would not say. In 1896 I paid $25 a month rent, and I paid that for one year; after that I paid $40 a month. I think the permanent structure was erected about the time the rent was increased from $25 to $40. When the temporary structure was erected, in 1894 or 1895, trains began to run on the temporary structure, which was a wooden affair, and was on the side of the old roadbed, while they were erecting the perma-
55 nent iron structure. I noticed the effects of the running of trains on the temporary structure and the noise was very disagreeable, very offensive. It was much more noisy than the old solid structure; much more dusty and more disagreeable.

In answer to the COURT:

The temporary structure was wood and the permanent structure was iron. I do not hear more noise since the iron structure has been put up there; there was more noise when the wooden structure was there.

In answer to PLAINTIFF'S COUNSEL:

There was much more noise on the trestlework than there was on the solid foundation, and more dust and cinders. When the change was made to the iron structure the effect as to dust, noise and cinders was much better than it was while the trestle was there, but it was more offensive than the old structure, and it is now.

Q. How do you compare the effects of the present structure with the effects produced by the running of trains on the solid roadbed prior to 1894?

A. There is more noise now than there was when the trains ran on the solid roadbed, and while that was there it gave us more privacy in the street; so in that respect it is more disagreeable now than it was then, and more noise and more cinders.

I think that wall was about ten to twelve feet high. That was a wall along the side of the old street-bed, and prevented a thoroughfare across the street; it afforded a sort of protection to our windows from the passing trains; there was no thoroughfare through there, and it made it a private street. As far as the dust and cinders are concerned, I don't see that there is much difference between the operation of the road now and the operation of the road on
56 the old roadbed; the principal difference is the noise. The roadbed is now much higher than it was in 1894; it runs

parallel with the top story of the house, and it formerly ran almost on the surface of the street. The noise of the passing trains can be heard more distinctly in the upper stories than formerly. I should say there was a difference in the dust and cinders on that account. Of course, there is more dust and cinders coming in when the windows are open; it covers everything in the room; in regard to the light, passing trains affect it more than when they ran on the original structure. Originally there was a wall there, but there is not now; so when you look out of the windows you see the trains pass. I cannot say how near the track is to the windows of the house; perhaps 35 or 40 feet. Trains go by very frequently, more frequently during some hours of the day than others; usually in the evening, between five and as late as nine o'clock they are very frequent; some at intervals of two and three minutes up to seven o'clock; then after that not so frequent, but enough to annoy you when you carry on a conversation. The noise of the passing trains is sufficient to interfere with conversation, so that you have to elevate your voice.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I threatened to move out in 1895 on account of the offensive surroundings. In the first place, when the trestlework was put up, there was a passage way made under the trestlework between the streets to enable the passengers to cross over from the east side of the street to the west side, and some of the neighbors on the other side, or wherever they might have come from, used to dump
57 garbage and ashes and all sorts of refuse under that trestlework.

Defendants' counsel moved to strike out the latter part of the answer.

By the COURT: He is answering a question as to why he threatened to move out.

WITNESS (continuing): Besides that some of the workmen that were working on the structure committed nuisance under the structure, and it was very offensive, and the trains rattling within a few feet of the windows made it very disagreeable. The water poured into the cellar on account of the way the pavement was put down; it poured right through the side of the house whenever it rained. That was while the temporary structure was there and until they got the present structure in shape. This water came into the cellar when they first tore up the pavement in order to build a temporary structure, which was some time in 1894, and it lasted until 1896 or 1897. I threatened to leave on January first, 1895; we had some talk some months before that; when the trouble first began I told him I could not stay there under the circumstances, and he said he thought it might be remedied—the water was the particular objection then, not the chief objection; the goings on under the trestlework by the neighbors and the workmen.

FRANK G. SWARTWOUT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am a real estate broker and appraiser, and my office is in the Mt. Morris Bank building, corner of 125th street and Park avenue.

I have been in the real estate business over twenty years, and
58 during that time have been carrying on business in Harlem in the city of New York. During that time I have carried on an active business in buying, selling and letting real estate. I have built property and had the care of property in New York during that time. I have appraised properties as a real estate expert during that period. It would be impossible to tell about how much real estate I have bought and sold in the city of New York during the last few years—between $2,000,000 and $3,000,000 a year. During that period the most of my business has been in the upper part of the city, both on the east and the west side.

I know this property of Mr. Keirns' corner of 114th street and Fourth avenue, and I have known it for the last twenty-five years, and I have been familiar with that neighborhood during that period and during the period I have been in business. I have bought, sold, rented and appraised real estate in that neighborhood during that time, and have been familiar with values during all that time. I have taken the *Real Estate Record and Guide* and have kept posted as to transactions as set forth therein, and have attended auction sales. I am acquainted with the value of the plaintiff's property and of property in that neighborhood for the last fifteen or twenty years. I have examined the premises of the plaintiff with a view to testifying as an expert in the case. The last time I examined them was this morning, and I had examined them a year or so ago. The premises consist of a three-story and basement brick and stone private dwelling house, located on the southeast corner of 114th street and Park avenue, 17 feet and 5 inches in width, and the lot 100 feet in depth, the house being about 40 or 45 feet deep. I do not know how many rooms there are in the house, but I should judge there

are about ten. I inquired and they said the house had all
59 the improvements. It seemed to be in very good repair.

I have noticed the structure of the defendants on which they operate their trains in front of the house; that structure prevents light and air and access. I remember the stone embankment upon which trains were run by the defendants prior to 1894.

Q. What difference, if any, exists between the present structure and the old structure with reference to the interference of light, air and access?

A. The present structure is much higher and wider, I should judge, and makes much more noise and smoke than there was to the old one; before, you could look right across the street and down the different streets and see the property on the opposite side; now you can't do it. When I was in the plaintiff's premises I observed the

effect of passing trains. There was a great noise, smoke, cinders, and you could feel the sidewalk fairly shake when the trains came along.

Q. Did that vibration affect the building at all, if you were sitting in the building?

A. Yes; the gas fixtures would shake, and anything that is anywhere loose in the house will rattle and make a noise when a train is passing along.

DEFENDANTS' COUNSEL: I except to the admission of the vibration as to the house.

There was no such effect as to vibration from the operation of trains on the former structure on the surface; it was a solid structure right on the ground and you felt no effect from it.

In my opinion the present value of these premises is $6,650. I consider the present rental value about $30 or $35 a month; that is, you could not get more than that. I consider that the value of the premises at the time the plaintiff bought it in 1882 as finished was about $12,500 or $13,000. In 1892, before the change in the structure of the railroad began, I valued the premises at $12,500.

The course of fee values on Fourth avenue at this point from 1892 to the present time, say from 110th street to 116th street, on the east side of the avenue, has been downward. Values have fallen 25 to 50 per cent.

The course of rental values has been downward, about 25 to 50 per cent. The rental value of these premises in 1892 was about $60 a month.

The first avenue to the west of Fourth avenue, running in the same direction, is Madison avenue. The course of values on Madison avenue at this point, from 1892 to the present time, has been upwards, about 25 to 50 per cent. There is no elevated railroad on Madison avenue, and has not been during that period.

The next avenue running parallel to this avenue on the east is Lexington avenue. The course of values on Lexington avenue, from 1892 to the present time, has been upwards, 25 to 50 per cent.

The course of values on the side streets between Madison and Lexington avenues, and from 110th to 120th streets, from 1892 to the present time, has been upwards, that is on the side streets up to within 200 or 300 feet of Park avenue, about ten per cent., and within 200 or 300 feet of Park avenue the course of values has been downwards, 10 to 15 per cent., and in some cases more.

Q. What fact has existed during that period which distinguishes that portion of the side streets within 200 feet of Park avenue from other portions of the side streets?

A. The change of the structure on Park avenue, increasing the noise principally.

I said the value of the plaintiff's premises in 1892 was $12,500.

Q. State the values for the succeeding years down to the
61 present time?

A. 1893, $12,000; 1894, $11,250; 1895, $10,750; 1896, about the same as 1895; 1897, $8,000; 1898, $7,500; 1899, $7,000; and 1900, $6,650.

There have not been many sales of property on Fourth avenue in this neighborhood within the last few years. There has been a number of foreclosures, about all the transfers or sales there have been foreclosure sales. Since 1893 and 1894 it has been almost impossible to let or sell property on Park avenue. In 1892 there was no difficulty in renting or selling property on Park avenue in this neighborhood.

Q. Comparing those three avenues—Lexington, Madison, and Park avenues—and the course of values there as they ran generally prior to 1892 in that neighborhood, above 110th street, has there been much difference in the course of values on those three avenues?

A. They were practically the same values, that is the corner of Madison, Lexington, and Park avenues and 114th street were practically the same, were worth the same price, and the general course of values had been about the same prior to 1892.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I was familiar with the old structure prior to 1894. That was a solid wall some feet high. It blocked up the avenue, and was a continuous wall right along the avenue. I think it was about 50 or 60 feet wide; now there is no wall there; the avenue is open under this structure outside of the columns, and the columns are placed in the street; all crossing the street. I have forgotten how many rows of heavy iron columns there are under this structure.

You can cross Park avenue at any point now from one side
62 to the other, but you could not do that before. You could not cross 114th street at grade before.

I never measured the height of this old wall, but I should judge it was about six or seven feet high, something like that, that is the wall and the railing on top of it. I should say the top of the parlor windows of this house are about six or seven feet above the curb; I never measured the height of the under beams of the new structure, but I should judge they are about 25 feet from the street to the top. The new structure is about 60 feet wide, and is a four-track road.

Q. What houses have you had on Lexington avenue for sale or have sold since 1892?

A. At 116th street, 124th street, 118th street, 128th street, 122d street and 109th street. The property at 116th street is the southeast corner. It is a five-story apartment house with store. I sold the lot on which the building stands for $26,000, I think it was. My brother-in-law bought the lot at auction about six months be-

fore, and I think he paid $20,000 for it. I cannot say when the last sale of that property was previous to that.

The property at the corner of 118th street and Lexington avenue was a three-story brownstone house, similar to the one in question, and was on the south-west corner. I sold that property during the nineties; I have forgotten what year it was; I think it was along about 1894.

I know the property at the north-east corner of Lexington avenue and 114th street; it is a four-story flat and store, brownstone front. I do not know that that property was recently sold.

The rental value of this property in suit in 1892 was $720; in 1893 it was about $700; in 1894 about $600; in 1895, $500; in 1896, about the same; in 1897, about $30 to $32 a month; in 1898
63 and 1899, about the same, and at the present time about the same.

I know the properties 103, 105, 107 East 114th street; that is about opposite the property in suit. I don't know that any of those properties sold recently; I have one for sale, No. 105. It is a three-story brownstone, similar to the house in suit. I sold 121 and 123. I sold those houses seven or eight years ago.

I know the property on the northeast corner of 116th street and Madison avenue; it is a seven-story apartment house and store; I do not know whether it was sold in 1898, but I know it has been sold several times. The last sale I know of was to Roberts & Ronkow within the last six months. It was reported as sold for $150,000. The broker who sold it told me he sold it for $150,000, or $160,000, I forget which. It was a trade. I do not know about the rents of that building.

I do not know the premises 116, 118 and 120 East 116th street.

I know the properties 73, 75, 77, and 79 East 116th street, built in 1890 by Mr. Gallagher; private dwellings. They are about 150 feet from Park avenue, I think. When those properties were sold when they were built they sold for $16,000 or $17,000. To the best of my recollection, they are 150 or 200 feet from the avenue; I believe they have been sold since they were first sold, but I don't know what they sold for; I know they sold for less.

In 1893 the value of the lot in question was $9,000 and the house $3,000. In 1896 the value of this property was $10,750, the same as it was in 1895. The value of the lot at that time was $8,250. In 1896 a full lot in this locality was worth about $12,000. I obtained the value of $8,250 for this lot by placing the value of a full
64 lot at $12,000. The size of this lot is 17 feet 6 inches front and rear and 100 feet deep.

Q. How much did you figure as the difference?

A. I figured it at so much per foot and deducted 25 per cent. of the balance on account of its being a small lot.

Plaintiff rests.

Defendants' counsel moved to dismiss the complaint on the following grounds:

1. That the plaintiff has failed to show that either of the defendants performed any of the acts complained of.

2. That the plaintiff has failed to show that he had any property or property rights which has been taken by either of the defendants.

3. That the only loss or inconvenience shown is that resulting from the tearing up of Park avenue for the reconstruction of the defendants' railroad by the board for the Park Avenue improvement, pursuant to legislative authority and direction.

4. That all of the acts complained of have been not those of the defendants or either of them, but of the board for the Park Avenue improvement above 106th street, a public body established by chapter 339 of the Laws of 1892, their contractors and agents.

5. That the plaintiff is barred by his own laches and acquiescence and the laches and acquiescence of his predecessors in title from maintaining this action.

6. That the defendants have obtained by prescription the
65 right to obtain and operate the permanent railroad structure consisting of an embankment prior to the acts done under chapter 702 of the Laws of 1872, and also under said act existing in Park avenue, in front of the plaintiff's premises, during the entire period for which damages are sought in this action, without liability for damage.

7. That the defendants have obtained by prescription the right to maintain and operate any lawful railroad structure either upon, below or above the surface of Park avenue, within the lines of the viaduct structure erected under the act of 1872, without liability to the plaintiff for damages, it appearing that the viaduct railroad structure in the course of erection opposite the premises described in the complaint during the period for which damages are claimed in this action has been erected wholly within the space occupied by the defendants for railroad purposes for more than twenty years prior to the commencement of this action.

8. That no material additional interference with the use and enjoyment of plaintiff's premises has been shown by reason of the elevation of the defendants' railroad upon a permanent viaduct structure.

9. That the plaintiff has failed to show any loss in fee or rental value from his premises due to the maintenance of the structure erected under chapter 702 of the Laws of 1872.

10. That the plaintiff has failed to show any loss in fee or rental value of his premises due to the permanent structure in course
66 of erection during the period for which damages are sought in this action, under chapter 339 of the Laws of 1892 or under chapter 548 of the Laws of 1894.

11. The plaintiff has failed to show any loss in fee or rental value of his premises due to the maintenance of the temporary wooden

trestle, or the operation of trains thereon, from the first day of February, 1895, or whatever date the record shows, to the 15th day of February, 1897. That the plaintiff is not entitled to recover any damages in this action against the defendants by reason of the use of the temporary wooden trestle opposite the plaintiff's premises in suit, such trestle not having been erected by the defendants, but by the board for the Park Avenue improvement, under due legislative and municipal authority, and shown to be necessary in the carrying out of the acts directed by chapter 369 of the Laws of 1892, and chapter 548 of the Laws of 1894.

12. That plaintiff has failed to show that the defendants, or either of them, have been guilty of any acts of negligence in maintaining the viaduct railroad structure erected under chapter 702 of the Laws of 1872, or in the operation of trains on said structure, or in the operation of trains upon said viaduct structure or structures, erected under chapter 339 of the Laws of 1892.

13. That the plaintiff has an adequate remedy at law.

14. That the plaintiff has failed to make out a case for equitable relief.

15. That upon the completion of the railroad structure
67 in 1874 or 1875, erected under chapter 702 of the Laws of 1872, the municipal authorities abandoned to the defendants for the sole and exclusive use of their railroad a strip of land along the centre of Park avenue about 58 feet in width, some portion of which had theretofore been devoted to the uses of a public street, subject to the rights of the railroad company. That the plaintiff himself, and his predecessor in title, for more than 20 years prior to the commencement of this action, acquiesced in such abandonment, and the defendants have by continued and exclusive use of said strip of land for railroad purposes, acquired the right as against the plaintiff to maintain and operate any railroad structure authorized and required by law on said strip of land, whether above or below the established grade of Park avenue.

Motion denied. Exception as to each ground on behalf of each of the defendants.

Defendants' counsel offered in evidence chapter 263 of the Laws of 1831.

The foregoing statute is not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so prihted.

Defendants' counsel offered in evidence resolution dated September 13, 1831, by the directors of the New York and Harlem Railroad Company, laying out the railroad, with map and profile of the same.

Received and marked Defendants' Exhibit 2.

The same is printed in the appendix to this case on appeal.

Defendant's counsel also offered in evidence ordinance of the common council of the city of New York, dated December 16,
68 1831, authorizing the New York and Harlem Railroad Company to construct their railroad.

Received and marked Defendants' Exhibit 3.

Defendants' counsel also offered in evidence agreement between the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York, dated January 9, 1832.

Received and marked Defendants' Exhibit 4.

The foregoing Exhibits 3 and 4 are printed in the appendix to this case on appeal.

Defendants' counsel offered in evidence deed, dated January 18, 1832, from Benjamin L. Benson to the New York and Harlem Railroad Company, and recorded in the office of the register of the city and county of New York, in Liber 338 of Conveyances, page 518, August 18, 1835.

Received and marked Defendants' Exhibit 4 A.

The same is in the words and figures following, to wit:

"This indenture, made this eighteenth day of January, in the year of our Lord one thousand eight hundred and thirty-two, between Benjamin L. Benson, of the Twelfth ward of the city of New York, party of the first part, and the New York and Harlem Railroad Company, parties of the second part,

Witnessed, that the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents by the said parties of the second part, the receipt whereof is hereby acknowledged, and they, the said parties of the second part, and their successors from every part and parcel thereof, for-
69 ever discharged by these presents, doth give, grant, bargain, sell and demise unto the said parties of the second part, and their successors, all that certain piece of land situate, lying and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York as the Fourth avenue, and is included within a space of 24 feet wide, running through the centre of said avenue and between 106th street and 116th street, and is bounded and described as follows, viz.:

Northerly by the old road leading from Harlem to Harlem lane and McGown's pass; southerly by land of Mrs. Margaret McGown, and east and west by lines drawn parallel to the centre line of the 4th avenue at the distance of twelve feet on each side thereof.

To have and to hold the said premises and messuage above mentioned, with the appurtenances unto the said parties of the second part, and their successors, from the day of the date hereof, for and during the full period of time, during which the said parties of the second part may remain an incorporated company, and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted, as

may be necessary to support their work, not, however, extending beyond the width of the avenue.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJ. L. BENSON. [SEAL.]

Signed, sealed and delivered in the presence of
I. ADRIANCE.

70 CITY AND COUNTY OF NEW YORK, ss:

On this first day of February, A. D. 1832, before me personally appeared Benjamin L. Benson, who is personally known to me, and he acknowledged to me that he executed the same as his act and deed for the uses and purposes therein mentioned. I allow it to be recorded.

I. ADRIANCE,
Com'r of Deeds in the City of New York."

Defendants' counsel offered in evidence petition of property owners in that neighborhood, and resolution of the common council as to the widening of Fourth avenue.

Received and marked Defendants' Exhibit 5.

The foregoing Exhibit 5 is printed in the appendix to this case on appeal.

Defendants' counsel offered in evidence chapter 702 of the Laws of 1872.

The foregoing statute is not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein, with the same force and effect as if so printed.

Defendants' counsel offered in evidence copy of a part of a map entitled "Plan and profiles of work to be done in conformity with the provisions of section 6 of the act entitled 'An act to improve and regulate the Fourth avenue in the city of New York,' passed May 14th, 1872," and upon which is endorsed "By order of the board, New York, June 26th, 1872. I. C. Buckhout, superintending engineer 4th Ave. improvement."

Received and marked Defendants' Exhibit 7.

The same is reproduced in the appendix to this case on appeal.

71 Defendants' counsel offered in evidence contract dated April 1, 1873, between the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, whereby the former leased to the latter its steam railroad north of 42d street, including the railroad opposite the premises described in the complaint, for the term of 401 years from the first day of April, 1873, for a certain annual rent therein specified, together with its rolling stock and other property, including its beneficial interest in a certain "tripartite lease," dated November first, 1872,

between the parties to said contract and the New York, New Haven & Hartford Railroad Company.

Received and marked Defendants' Exhibit 8.

The foregoing Exhibit 8 is not printed in this case on appeal, but may be produced and used upon the argument of any appeal herein by either party with the same force and effect as if so printed. In the event of its non-production it shall be deemed sufficiently described above.

Defendants' counsel offered in evidence chapter 907 of the acts of Congress dated September 19th, 1890, requiring bridges over the Harlem river to be raised to a height of 24 feet above tide water.

Also chapter 339 of the Laws of 1892.

The foregoing statutes are not printed in this case on appeal, but may be produced or referred to by either party upon the argument of any appeal herein, with the same force and effect as if so printed.

Defendants' counsel offered in evidence a map entitled "Plans for the improvement of Park avenue above 106th street in the
72 city of New York, exhibiting by map, profile and cross sections the work of alteration and changes to be made in the structure of the New York & Harlem railroad on Park avenue, between 106th street and Harlem river in the city of New York, prepared for filing in the office of the comptroller of the city of New York in conformity with the provisions of chapter 339 of the Laws of the State of New York, approved April 19, 1892. Approved November 10, 1892, Charles W. Dayton, president; Jas. H. Haslin, secretary; Walter Katte, superintending engr.; John Fox, G. W. Birdsall, the board for the Park Avenue improvement above 106th street; also endorsed "Approved November 10, 1892, Thos. F. Gilroy, commissioner of public works, city of New York," filed in the office of the comptroller of the city of New York, November 12, 1892, signed "Theo. W. Myers, comptroller."

Received and marked Defendants' Exhibit 11.

The foregoing plan is not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein, with the same force and effect as if so reproduced. In the event of its non-production it shall be deemed sufficiently described above.

Defendants' counsel offered in evidence "Amended plan for the improvement of Park avenue, above 106th street, in the city of New York," approved June 14, 1894, by Michael F. Daly, commissioner of public works in the city of New York, and filed in the office of the comptroller of the city of New York, June 21st, 1894.

Received and marked Defendants' Exhibit 12.

The foregoing Exhibit 12 is reproduced in the appendix to this case on appeal.

73 Defendants' counsel offered in evidence chapter 548 of the Laws of 1894.

The foregoing statute is not printed in this case on appeal, but

may be produced or referred to by either party upon the argument of any appeal herein with the same force and effect as if so printed.

Defendants' counsel offered in evidence a map entitled "Comparative profiles of the railroad structure at various dates," showing the profiles of the different structures with the railroad grade at that place. This map shows the surveys of the avenue in 1831, the grade of the railroad from 1835 to 1872, the grade of the railroad from 1872 to 1896, the grade of the railroad in 1897 and the grade of Park avenue.

Received and marked Defendants' Exhibit 14.

Defendants' counsel offered in evidence map showing temporary trestle at 114th street, the plan of the structure.

Received and marked Defendants' Exhibit 15.

The foregoing Exhibits 14 and 15 are reproduced in the appendix to this case on appeal.

PLAINTIFF'S COUNSEL: As we understand the court of appeals decision in the Lewis case, the court holds that the plaintiff can only recover for the maintenance and operation of the trestle work from the date when the railroad company began to operate trains upon it, and for the maintenance and operation of the permanent structure from the date when the railroad company began to operate trains upon the permanent structure, and we will limit our claim in that manner.

74 GEORGE H. THOMPSON, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

My occupation is that of civil engineer and consulting engineer. I have been in practice as a civil engineer 36 years, and during that time my work has consisted principally of the construction of railroads and structures pertaining to railroads, bridges, &c.

I was retained by the New York Central & Hudson River Railroad Company in 1892 or 1893 to make a plan for the structure on Park avenue, and I made such a plan. In the plan which I made the proposed structure commenced at the Harlem river on the northern end, and at the southern end, I think, at 112th street, possibly 111th street; that plan was adopted. I have watched the structure during the progress of the work. The original plan provided for rock ballast, but it was not put in at first; it has been put in within a year, and the whole structure is now ballasted. The effect of that ballast as to noise and the operation of trains upon the structure is to reduce the noise or intensity, transmission, &c.

JOSEPH H. FRANKLIN, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 14 East 125th street, and I am manager of the Grand Central Depot and the Harlem line. I have charge of the running of the trains between the Grand Central depot and the Harlem river, and I have had charge of that work since 1892. I am
75 familiar with the number of trains that ran in Park avenue, between the Grand Central depot and the Harlem river, prior to 1892.

They have four separate tracks there, running four trains on them—two each way.

I am familiar with the number of trains that run in Park avenue now between the Grand Central depot and the Harlem river. There are four tracks on the present structure, two for north-bound trains and two for south-bound trains; the south-bound trains run on the east side, and the north-bound trains on the west side, and on the old structure they ran the same way. The structure is ballasted with stone at the present time.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

The number of trains a day that run up and down Park avenue averages about 475.

Q. What is the space of time between each train?

A. That depends on the hours; in the morning, from seven o'clock, they are only two or three minutes apart, and from four o'clock to seven o'clock in the evening about the same. I mean 475 trains both ways.

Q. How many cars are there to a train on an average?

A. We count every engine or anything that goes over the line a train, an engine alone; I don't think they would average over four cars to a train. Those cars will average about 65 feet in length.

Q. What is the weight of the engine?

A. We have different classes of engines; we have engines from 60 tons up to 100 tons. We run all kinds of engines on this structure, from 60 to 100 tons in weight; I suppose the express trains have the largest engines. The speed of the express trains, which run over this structure at 114th street, will average about 25 miles
76 an hour. The local trains that make stops run slower at that point; those that stop at 110th street would not go over 10 or 15 miles an hour. There is another station at 125th street.

Re-direct examination—In answer to DEFENDANTS' COUNSEL:

The locomotives passing over this structure burn hard coal; some burn soft coal; those that burn soft coal carry coke, and burn coke within the city limits.

In answer to PLAINTIFF'S COUNSEL:

There has been no material change in the number of trains in the last two years. The same number of trains ran over the temporary structure as are now running over the permanent structure.

LORENZO S. PALMER, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at No. 35 West 132d street. My business is that of a real estate broker and appraiser. My office is in the Twelfth Ward Bank building, 147 East 125th street. I have been a real estate broker and appraiser between 15 and 16 years, and during that time my office has been principally in Harlem. During that time I have bought and sold houses and different kinds of properties in the neighborhood of Park avenue and 114th street. I have examined this property at the southeast corner of 114th street and Park avenue within a week. I went through the property. The house is 17 feet 6 inches by about 45 feet, and the lot is 100 feet in depth running along the avenue.

The present value of the property is $13,000; $9,500 for the lot, and $3,500 for the building.

77 I was familiar with the value of property in Harlem in this neighborhood in 1892. The value of this property in 1892 was $11,500; $6,500 for the lot and $5,000 for the building. I was familiar with the value of property in that neighborhood in 1892. The value of this property at that time was $11,000; $6,500 for the lot, and $4,500 for the building. I was familiar with the value of property in that neighborhood in 1896. The value of this property at that time was *was* $10,500; $6,500 for the lot, and $4,000 for the building.

I am familiar with the rental values of property in Harlem in that neighborhood. The present rental value of that property at 114th street and Park avenue is $55 a month, or $660 a year. Its rental value in 1892 was about the same, and in 1894 about $600 a year, and in 1896 about $540 a year.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

I have been in business for myself since October, 4th, 1889. I am 34 years of age.

I have sold property in this neighborhood at 114th street and Park avenue. I sold property directly opposite the plaintiff's property in 1894. I sold property in the same street, just farther west. I have sold property in Fourth avenue; No. 1642, 25 feet north of 116th street on the west side of Park avenue. I sold that in 1893. I sold the north-west corner of 102d street and Park avenue last month. I have sold nothing else on Park avenue.

I am in business alone.

I said the property that I sold in 1893 was on the west side of Park avenue, 25 feet north of 116th street. I believe that property has been sold since I sold it in 1893, but I don't know just what
78 year it was sold, but I think in the neighborhood of 1896 or 1897. I think it was sold the last time on the exchange, and I believe it brought $19,000. I sold it in the spring of 1893 for $23,500. It has been sold since but I don't know at what price.

My business is buying and selling; I do very little letting; it is mostly buying and selling.

I have rented property on Park avenue. I rented the northwest corner of 117th street and Park avenue in 1889—1887, 1888. Since that I rented the southwest corner of Park avenue and 116th street, in 1892. I don't know as I ever rented any on Park avenue since 1892.

The course of fee values on Park avenue for the last three or four years up to 1897, until this new structure, was about stationary. It was stationary since about 1891 or 1892 to 1897.

The course of values on Madison avenue from 1892 to 1897 in that neighborhood has appreciated possibly 15 per cent.

The course of fee values in Lexington avenue in that neighborhood from 1892 to 1897 was about stationary.

The course of rental values on Park avenue from 1892 to 1897 has depreciated about 10 per cent. From 1897 to the present time there has been an appreciation of about 15 per cent. The rentals on Park avenue, in this neighborhood, are about the same at the present time as they were in 1892.

The course of rental values on Madison avenue from 1892 to the present time in this neighborhood has been about stationary, and from 1892 to 1895 it was stationary, and from 1895 to 1900 it was stationary.

Defendants' counsel offered in evidence photograph showing the property in question, the street, and also the structure.

Received and marked Defendants' Exhibit 16.

79 The foregoing Exhibit 16 is not reproduced in this case on appeal, but may be produced and used by either party upon the argument of any appeal herein, with the same force and effect as if so reproduced. In the event of its non-production, it shall be deemed sufficiently described above.

Defendants' counsel renewed his motion to dismiss the complaint on all the grounds stated at the close of the plaintiff's case.

The foregoing case on appeal contains all the evidence, exceptions and proceedings taken and had upon the trial of the above action.

(Here follows diagram marked p. 80.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

81 PLAINTIFF'S EXHIBIT F.

Upon the original map, of which the preceding is a partial copy, is inscribed the following:

"The commissioners appointed by an act entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes," passed April 3, 1807, certify this map to be made in conformity with the provisions of said act, and in witness thereof have hereunto subscribed their names and affixed their seals the twenty-second day of March in the year of our Lord one thousand eight hundred and eleven.

GOUV'R MORRIS.
SIMEON DE WITT.
JOHN RUTHERFORD."

(Here follow diagrams marked pp. 82, 83, & 84.)

85 & 86 DEFENDANTS' EXHIBIT 2.

Upon the original map, of which the preceding is a partial copy, is inscribed the following:

"At a meeting of the board of directors of the New York and Harlem Rail Road Company in the city of New York on Tuesday the 13th September 1831, it was resolved that the line of the route of their rail road be through the centre of the Fourth avenue from the north side of 23rd street to Harlem river and also that the line of the route of the branch of the same be through the centre of 125th St. from the centre of the 4th avenue to the Hudson river and that the maps of the same as made by Edwin Smith city surveyor be presented to the common council of the city of New York for *the* approval previous to the filing of the same in *the* pursuance of the requirements of the act of incorporation.

Witness- of hands and seals,

CAMPBELL P. WHITE.
ISAAC ADRIANCE.
I. L. JESSUP.
A. HOSACK.
HENRY HONE.
JOHN LOZIER.
JOHN MASON.
SAM'L F. HALSUP."

87 DEFENDANTS' EXHIBITS 3 AND 4.

New York and Harlem Railroad.

Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the Mayor, Aldermen, and Commonalty of the City of New York, parties of the second part.

Whereas, an ordinance of the common council of the city of New York was passed by the board of aldermen on the sixteenth day of December, last, and by the board of assistants on the 19th day of December last, and approved by the mayor of said city on the twenty-second day of December last, which ordinance is in words and figures following, to wit:

A Law to Authorize the New York and Harlem Railroad Company to Construct Their Railway.

SECTION 1. Be it ordained, etc., That the New York and Harlem Railroad Company be, and they hereby are, permitted to construct

and lay down, in pursuance of their act of incorporation, a double or single track or railroad, or railway, along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity with a map now on file in the register's office, and a branch thereof along One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, provided that the width of such double railroad or way shall not exceed twenty-four feet.

SECTION 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New
88 York and Harlem Railroad Co., it shall appear to the mayor, aldermen and commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue (of which the said mayor, aldermen and commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said mayor, aldermen and commonalty, forthwith provide a remedy for the same, satisfactory to the said mayor, aldermen and commonalty; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down; and, should the said directors decline or neglect to obey such requisition, the said mayor, aldermen and commonalty, may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed, and the avenues or streets restored as aforesaid, at the expense of the said railroad company.

SECTION 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and the speed of the same, as well as all other power reserved to the said mayor, aldermen and commonalty, by the act of incorporation of the said company, or any part thereof, be, and the same are hereby, expressly retained and reserved.

SECTION 4. That it shall expressly be incumbent on the said New York and Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets now or hereafter to
be made (which will be intersected by the embankments or
89 excavations of the said railroad), and which, in the opinion of the common council, the public convenience requires to be arched or bridged, and also to make such embankments or excavations as (in the opinion of the common council) may be required to make the passage over the railroad and embankments, at the intersected cross streets, easy and convenient for all the purposes for which streets and roads are usually put to; and also, that the said company shall make at their own like cost and charges, all such drains and sewers as their embankments and excavations may (in the opinion of the common council) make necessary; all which work to be done under the like requisition, and under like disabilities, as in the second section of this ordinance mentioned. And

further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulation of the avenue and road through which said railroad passes.

SECTION 5. That it shall be incumbent on the said New York and Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation; and unless they commence and complete the same in the periods of time for the said commencement and completion in said incorporation specified, that then the consent of the common council, and all the powers and privileges given in this ordinance, shall cease and be null and void.

SECTION 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or, if any time after the construction of the said railroad, the same should be discontinued, or not kept up and in repair as a good and sufficient railroad, that then the strip of land to be taken for the
90 said railroad should be thrown open and become a part of the street or public avenue, without any assessment on the owners of the adjoining land or the public therefor.

SECTION 7. That no building shall be erected on the said strip of land to be taken for said railroad, and that a railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railing or fences on the edges of the excavations, as the common council shall, from time to time, deem necessary to prevent accidents and loss of lives to our fellow-citizens.

SECTION 8. That this ordinance shall not be considered as binding on the common council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing (promising, covenanting and engaging, on their part and behalf, to stand to, abide by and perform all the conditions and requirements in this ordinance contained) as the mayor and the council of the board shall, by their certificate approve, and not until such instruments shall be filed, so certified, in the comptroller's office of this city.

Passed by the board of aldermen, December 16, 1831.

Passed by the board of assistants, December 19, 1831.

Approved by the mayor, December 22, 1831.

Now, this agreement witnesseth, that for and in consideration of the premises, and in pursuance of the requirements of the eighth section of said ordinance, the said parties of the first part do hereby for themselves and their successors, promise, covenant and engage to and with the said parties of the second part and their suc-
91 cessors and assigns, to stand, abide by and perform all the conditions and requirements in the said ordinance contained.

In witness whereof, the said parties of the first part have hereunto affixed their corporate seal and caused the same to be signed by

their vice-president (in the absence of their president), and attested by their secretary, the day and year aforesaid.

JOHN MASON, [L. S.]
Vice-President.

Witness:
ISAAC ADRIANCE,
Secretary *pro tem.*

92 To the honorable the common council of the city of New York:

The memorial of the undersigned, owners of property on Fourth avenue, respectfully represents that the central position of the said avenue, terminating, as it does, at Union place and forming the outlet for that large portion of the population which passes through Broadway and the Bowery and the occupation of the middle part of the avenue for the Harlem railroad render it extremely desirable that its width should be increased to one hundred and forty feet. By thus widening it, convenient thoroughfares on each side of the railroad will be afforded, as well as ample accommodations for the numerous vehicles with which the avenue must otherwise ere long be crowded and obstructed. The undersigned, therefore, respectfully ask that the common council will take the necessary measures to have the map of the city so altered as that the Fourth avenue may, throughout its whole length, be rendered of the width of one hundred and forty feet, and your memorialists as in duty bound will ever pray, etc.

New York, May —, 1835.

ISAAC ADRIANCE.
W. B. LAWRENCE.
ARCH. WATT.
SAMUEL SWAN.
CHAS. HENRY HALL.
P. POILLON.
WM. SHERWOOD,
Four Lots at 110th Street.
ENOCH WISWALL.
S. M. LEVENGSTON,
Sixteen Lots on the Avenue.
ANTHONY ARNOUX,
Twelve Avenue Lots.
JNO. R. PETERS.
ANSON BLAKE,
Fourth Avenue and Forty-third, Forty-fourth, and Forty-fifth Streets.
GEO. FAIR AND
ABR'M LOE RUWOOD,
Seventy-four Lots between Fourth and Fifth Avenues and Forty-fourth and Forty-fifth Streets.

93 To the honorable the corporation of the city of New York:

The undersigned owners and lessees of property on the Fourth avenue in the city of New York respectfully represent:

That they have observed a notice of the street commissioner, that a petition has been laid before your honorable body for the widening of the Fourth avenue to one hundred and forty feet—against the granting of which petition the undersigned do respectfully but most earnestly remonstrate for the following reasons:

First. Because the taking of twenty feet additional from the lots now improved by several of the undersigned would cause the demolition of their dwellings, ruin their property and retard its improvement and thereby compromise their rights as citizens of this great Republic.

Second. Because it is perfectly unnecessary, as the public convenience does not require it, nor the probable amount of travel on said avenue warrant it, for it will be relieved from any excess by Irving place and the Third and Fifth avenues, which are also one hundred feet avenues and judged to be of sufficient width to accommodate all the travel which may at any future time be requisite.

Third. Because the expense of widening would far exceed any possible benefit which could be derived from the increase of width, as it is estimated that the cost of widening south of Thirty-fourth street alone would be at least two hundred thousand dollars.

Fourth. Because the expense makes it perfectly ineffectual, as the assessments consequent on the injury to property would in
94 fact amount nearly to a confiscation of the property on each side of the avenue and there would be no one to pay it.

Fifth. Because the agitation of such a question at this time gives a bad impression in regard to property on this avenue by retarding improvements.

Sixth. Because if more carriage room should at any time be required, that object could be attained by narrowing the sidewalks which are quite spacious.

The undersigned, therefore, respectfully request that they may be heard further before the committee on the subject, and request that they may be personally notified whenever the subject may be discussed.

New York, Sept. 19, 1835.

PETER COOPER,	BENJ. W. VICKAR,
GILES BUSHNELL,	I. GREEN PEARSON,
SAM. B. RUGGLES,	E. INGHAM SCHIEFFELIN,
CHARLES C. KING,	SILAS WRIGHT,
JAS. LEARY,	WILLIAM LOVE,
ALLAN McKENZIE,	JOHN WATTS,
ELLIS EDGAR,	EDM. WILKES,
ROB'T PETTIGREW,	HENRY WILKES,
N. B. MOUNTFORD,	HORATIO WILKES,
G. A. FURST,	E. B. BOSTWICK,
D. C. TAYLOR,	WILLIAM KENT,
SAM. BROOKS,	ROB'T CENTER,
CHAS. S. LIVINGSTON,	WM. REID,
A. TIEMANN,	JOHN W. VICKAR,
J. B. W. VICKAR,	SAM'L W. MOORE,

Board of Ass. Ald.

The committee on roads and canals to whom was referred the annexed petition for widening the Fourth avenue throughout its whole extent to 140 feet width and the remonstrance against the same, respectfully report, that your committee have given
95 the same a thorough examination, have caused the same to be advertised and have heard the parties in favor of and opposed to the measure.

The petitioners represent that the centre of this avenue is now occupied by the railroad, and that from its central position, it will become a great thoroughfare for the population in that part of the island.

Your committee are aware of the importance of these considerations, and they are of opinion that the proposed alteration would be beneficial to the avenue and a great improvement to the property in that neighborhood.

There has been but little objection to the same above Twenty-eighth street, and though your committee think that it is desirable to widen the same to Union place, yet inasmuch as a majority of the owners below Twenty-eighth street have opposed the measure, your committee do not recommend that this extension should take place lower down than Twenty-eighth street.

There are but few buildings now erected on this part of the avenue, and the alteration cannot be made at any future period at a less expense than at the present time.

It is not proposed to open it at present, but to alter the map of the city so that whenever the Fourth avenue is opened, it shall be 140 feet in width and so as to prevent the erection of buildings on the avenue when so widened.

Your committee therefore submit the following resolution:

Resolved, That the map or plan of the city be altered so as to make the Fourth avenue 140 feet wide by adding twenty feet on each side of the same from Twenty-eight street to Harlem river.

D. P. INGRAHAM,
JOHN V. GREENFIELD,
Committee on Roads and Canals.

96 *Resolved*, That the counsel of the board take the necessary measures to procure a law of legislature authorizing such alteration.

To the honorable the corporation of the city of New York:

The undersigned, a resident and owner of property on the Fourth avenue, begs leave to represent to your honorable body that he has learnt with regret that a petition is now before your honorable body for widening said Fourth avenue to the width of 140 feet, against the granting of which petition the undersigned most urgently remonstrates and requests of your honorable body a consideration of

the very great inconvenience and sacrifice of property resulting therefrom. The improvements made by the undersigned between Twenty-ninth and Thirtieth streets, in erecting two substantial brick houses could not at this time be accomplished for the sum of eighteen thousand dollars, which would be wholly demolished and ruined. Twenty-five thousand dollars would not be a sufficient compensation for the loss and injury which would result to the undersigned, without his deriving any possible advantage therefrom.

Your honorable body will perceive by the slight draft which accompanies this communication that the proposed widening would deprive the undersigned of so much land as to prevent his making further improvements and render the portion left him almost valueless. For instance, the lot on the corner of Twenty-ninth street with brick house thereon contains in depth but seventy-six feet; to take therefrom twenty feet would leave only a fifty-six foot lot for him to rebuild on.

The undersigned is owner of ten lots of lands on the Fourth avenue between Twenty-ninth and Thirty-first streets (two of
97 which are leased to a religious society on which they are now erecting a church), several of which are so peculiarly situated in regard to depth that the taking of twenty feet therefrom would amount almost to a confiscation of the property, as it would render them nearly useless for improvements.

The undersigned, therefore, respectfully requests that the proposed widening of Fourth avenue may not be extended below Thirty-fourth street or Murry's square, as it would not then interfere with any improved property, but prevent the ruination of the lots and buildings below. Not one owner, as is believed, having petitioned for, but, on the contrary, are opposed to the said widening.

New York, January 4th, 1836.

GILES BUSHNELL.

Board of Aldermen.

The street committee, to whom was referred the accompanying papers from the board of assistants in relation to widening the Fourth avenue twenty feet on each side, respectfully report, that they concur with the committee of the board of assistants in their report on this subject as to the propriety and expediency of widening the avenue; but recommend an amendment to the resolution appended to the report by making the widening commence at Thirty-fourth street instead of Twenty-eighth street. There are some valuable buildings between Twenty-eighth and Thirty-first streets which the committee think inexpedient to disturb, and as it is not recommended to widen the avenue throughout its whole extent to
98 Union place, they can perceive no reason why the widening shall not commence at Thirty-fourth street, which will not

only avoid the expense of removing these buildings, but be more suitable, as Thirty-fourth street is the northern termination of a square laid out on each side of the Fourth avenue between Thirty-first and Thirty-fourth streets, called Murray Hill square. They therefore recommend the adoption of the resolutions passed by the board of assistants with an amendment to the first resolution by striking out from the third line the words "Twenty-eighth street" and inserting the words "Thirty-fourth street," so that the resolution as amended will read as follows:

Resolved, That the map or plan of the city be altered so as to make the Fourth avenue 140 feet wide by adding twenty feet on each side of the same from Thirty-fourth street to Harlem river.

EDWARD TAYLOR,
R. R. WARD,
NICH. WATERBURY,
Street Committee.

Board of Ass. Ald.

The street committee to whom was referred the annexed papers from the board of aldermen relative to the widening of the Fourth avenue, respectfully report that they recommend a concurrence in the amendment adopted by the board of aldermen.

C. S. WOODHULL,
W. W. HOLLY,
C. D. FOREST,
Street Committee.

New York, Feb'y 13th, 1837.

99 & 100 Board of Aldermen.

Resolved, That the map or plan of the city be altered so as to make the Fourth avenue 140 feet wide by adding twenty feet on each side of the same from Thirty-fourth street to Harlem river.

Resolved, That the counsel of the board take the necessary measures to procure a law of the legislature authorizing such alteration.

Adopted by the board of aldermen, Jan. 30, 1837.
Adopted by the board of assistants, Feb'y 14, 1837.
Approved by the mayor, Feb'y 17, 1887.
New York, April 17, 1893.

I hereby certify that the foregoing paper is a true copy of the documents on file in this office.

MICHAEL F. BLAKE,
Clerk Common Council.

101 DEFENDANTS' EXHIBIT 7.

The original map, of which the preceding is a copy, is entitled as follows:

"Plan and profiles of work to be done in conformity with the provisions of section 6 of the act entitled 'An act to improve and regulate the Fourth avenue in the city of New York,' passed May 14th, 1872."

And upon which is endorsed

"By order of the board, New York, June 26th, 1972.

I. C. BUCKHOUT,
Superintending Engineer 4th Ave. Improvement."

(Here follow maps marked pp. 102, 103, 104, & 105.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

106 Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are copies of the judgment roll, papers, notice of appeal and case and exceptions in this action on file in the office of the clerk of the county of New York.

Dated New York, March 23, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

It is hereby consented that the within-printed case on appeal may be ordered on file as and for the original case on appeal, as settled herein.

Dated New York, March —, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

It is so ordered.

Dated New York, March 25, 1901.

ABM. R. LAWRENCE, J. S. C.

107 At a term of the appellate division of the supreme court for the first department, held at the court house of the appellate division in the county of New York, on the 29th day of April, 1901.

Present: Hon. Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch, J. J.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Order of Affirmance.

The defendants having appealed to this court from the judgment in this action, entered in the office of the clerk of the county of New York on the 18th day of January, 1901, in favor of the plaintiff and against the defendants, for the sum of $1,639.32 damages and costs and for an injunction, and the said appeal having duly come on to be heard, and having been duly argued by Ira A. Place, Esq., for the appellants, and Alfred B. Cruikshank, Esq., for the respondent and due deliberation having been had thereon;

Now, on motion of Atwater & Cruikshank, attorneys for the plaintiff-respondent, it is

Ordered, that said judgment be and the same hereby is affirmed with costs and disbursements to the respondent.

108 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants. } Judgment of Affirmance.

The defendants above named having appealed to the appellate division of this court from the judgment entered herein on the 18th day of January, 1901, in the office of the clerk of the county of New York, in favor of the plaintiff and against the defendants, and said appeal having been duly heard by said appellate division, and the said judgment having been affirmed, with costs to the plaintiff, by the appellate division, as appears by the remittitur from said appellate division, duly filed in the office of the clerk of the county of New York on May 7th, 1901, and the costs of the plaintiff having been duly taxed at the sum of eighty-eight and 75/100 dollars;

Now, on motion of Atwater & Cruikshank, attorneys for plaintiff, it is

Adjudged, that the said judgment entered herein on January 18th, 1901, be and it hereby is in all things affirmed; and it
109 is further adjudged, that the plaintiff, John Keirns, recover of the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of eighty-eight and 75/100 dollars, costs of said appeal, and that execution issue therefor.

Dated New York, May 7, 1901.

WILLIAM SOHMER, Clerk.

110 Supreme Court, Appellate Division, First Department, April, 1901.

Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Judgment affirmed, with costs. No opinion. (Van Brunt, P. J., dissenting.) 60 App. Div. Reports, 630.

STATE OF NEW YORK, County of New York, } ss.:

Charles C. Paulding, being duly sworn, deposes and says: That he is an attorney and counselor-at-law, and is of counsel for the de-

fendants in the above-entitled action, and is familiar with the different proceedings in the action; that the foregoing memorandum was handed down by the appellate division upon the decision of the appeal herein, and no opinion was rendered.

CHARLES C. PAULDING.

Sworn to before me this 23d day of September, 1901.

JOHN A. MATTISON,
Notary Public, New York County, N. Y.

111 Supreme Court, New York County.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Notice of Appeal to the Court of Appeals.

SIRS: Please take notice that the defendants above named and each of them hereby appeal to the court of appeals from the judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of New York county on the 7th day of May, 1901, upon an order entered in the office of the clerk of the said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of New York county on the 18th day of January, 1901, in favor of the above-named plaintiff and against the defendants, which judgment awarded the plaintiff herein an injunction unless the defendants paid the sum of twenty-five hundred and twenty-five dollars fee damages, and further awarded the plaintiff a money judgment against the defendants for the sum of twelve hundred and ninety-six dollars, be affirmed, with two hundred and eighty-
112 nine and 10/100 dollars costs to the plaintiff, and from each and every part of said judgment.

Dated borough of Manhattan, N. Y. city, N. Y., May 22, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants-Appellants.

Office and post office address, room 417 Grand Central station, borough of Manhattan, New York city, N. Y.

To William Sohmer, Esq., county clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.; and

Atwater & Cruikshank, Esqs., attorneys for plaintiff-respondent, 34 Cedar street, borough of Manhattan, New York city, N. Y.

113 In the Court of Appeals.

JOHN KEIRNS, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Stipulations under Sections 3301 and 1353 of the Code.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the judgment roll, papers, notice of appeal to the appellate division of the supreme court, case and exceptions, of the order of the appellate division, and of the judgment entered thereon, and of the notice of appeal to the court of appeals, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, N. Y., September 24, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

114 Opinion of Court of Appeals.

JOHN KEIRNS, Respondent,
v.
THE NEW YORK AND HARLEM R. R. CO. ET AL., Appellants.

(Decided February 24, 1903.)

Appeal from a Judgment of the Appellate Division of the Supreme Court in the First Judicial Department Affirming a Judgment Entered upon a Decision of the Court After a Trial at Special Term.

Ira A. Place for appellants.
Alfred B. Cruikshank for respondent.

Per Curiam:

Judgment reversed and the complaint dismissed without costs upon the authority of Fries *v.* N. Y. & Harlem R. R. Co. (169 N. Y. 270), and Muhlker *v.* N. Y. & Harlem R. R. Co. (173 N. Y. —).

VANN, J. (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (Lewis *v.* N. Y. & Harlem R. R. Co., 162 N. Y. 202.) The essential facts of the

two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (Fries *v.* N. Y. & Harlem R. R. Co., 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the State had the right to require the grade upon which the railroad was run to be changed; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

115 This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations, I now yield to it as establishing the law of the State, since the principle upon which it rests has been sanctioned and applied in another case by this court. (Muhlker *v.* N. Y. & Harlem R. R. Co., 173 N. Y., —).

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the *Muhlker* case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

Parker, Ch. J., Bartlett, Haight, Martin and Werner, JJ. (and Vann, J., in memorandum), concur; Gray, J., not sitting.

Judgment reversed, etc.

116 At a special term, part II, of the supreme court, held in and for the county of New York, at the county court house in said county, on the 31st day of March, 1903.

Present: Hon. Samuel Greenbaum, justice.

JOHN KIERNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The defendants herein having appealed to the court of appeals of the State of New York from a judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of the county of New York on the 7th day of May, 1901, upon an order entered in the office of the clerk of said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of the county of New York on the 18th day of January, 1901, be affirmed, with costs, and the said court of appeals having directed that the said judgment be reversed and the complaint dismissed without costs, and having directed that the record of the proceedings be remitted to this court to be enforced according to law, and the said remittitur having been duly filed in the office of the clerk of the county of New York: now on
117 motion of Ira A. Place, Esq., attorney for the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, it is

Ordered that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that this order and the judgment to be entered hereon be annexed to the judgment roll.

S. G.,
J. S. C.

118 Supreme Court, New York County.

JOHN KIERNS, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The judgment herein, in favor of the plaintiff and against the defendants, having been entered in this court on the 18th day of January, 1901, upon a decision of the Hon. Abraham R. Lawrence, J., for an injunction and for the sum of one thousand six hundred and thirty nine and thirty two hundredths dollars ($1,639.32), and the defendants having appeared from said judgment to the appellate division of the supreme court for the first department, and the said

judgment having been affirmed by the said appellate division and judgment of affirmance having been accordingly entered therein on the 7th day of May, 1901, and the said defendants having appealed therefrom to the court of appeals, and the said court of appeals having sent hither its remittitur, filed herein on the 31st day of March, 1903, by which it appears that the said court of appeals has reversed the said judgment so appealed from, without costs, and has given judgment accordingly, and has remitted its said judgment to this court to be enforced according to law, and this court having, by order dated the 31st day of March, 1903, and duly entered herein,
119 ordered that the said judgment of the court of appeals be made the judgment of this court, now on motion of Ira A. Place, Esq., attorneys for the defendants herein, it is

Adjudged that the judgment of said court of appeals be, and the same hereby is, made the judgment of this court; and it is further

Ordered and adjudged, that the said judgments of the supreme court herein so appealed from, be and the same hereby are, reversed and the complaint dismissed without costs.

Judgment signed and entered this 31st day of March 1903.

THOS. L. HAMILTON, Clerk.

M. J. D.

119½ [Endorsed:] Supreme court, New York county. John Kierns, plaintiff, against The New York & Harlem Railroad Co., *et al.*, defendants. Judgment on remittitur from court of appeals. Ira A. Place, defendants' att'y.

120 In the Supreme Court of the United States.

PATRICK KIERNS, as Executor, etc., Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants in Error.
} Assignment of Errors.

Afterwards, to wit, on the seventh day of January, in the year of our Lord, one thousand nine hundred and four, in this same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes Patrick Kierns representing the original plaintiff and plaintiff in error herein, and by his attorneys and counsel Henry G. Atwater and Alfred B. Cruikshank, says:

That in the record, proceedings, decision and final judgment of the court of appeals of the State of New York, and of the supreme court of the State of New York aforesaid, in the above entitled suit or action, there is manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment aforesaid given, was given by the court of appeals of the State of New York against the said John Kierns, the original plaintiff, and in favor of The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error; whereas, by the law of the land the said judgment ought to have been given for the said John Kierns against
121 the said New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

II. That the said court of appeals of the State New York erred in holding and deciding that the complaint of the original plaintiff should be dismissed.

III. That the said court of appeals of the State of New York erred in holding and deciding that, under the statute authorizing or requiring the erection and maintenance of the elevated railroad structure and the operation thereon of trains as complained of by the original plaintiff, the plaintiff in error has no remedy against the defendants in error and defendants in error below, herein; thereby holding and deciding that the said plaintiff might be and has been deprived of his property by said defendants without due process of law; the said court of appeals thus holding and deciding in violation of the Constitution of the United States and especially of section I, article XIV of the amendments to said Constitution.

IV. That the said court of appeals of the State of New York erred in holding that chapter 339 of the Laws and Statutes of 1892 of the State of New York, is constitutional and that it does not offend against that portion of the fourteenth amendment to the Constitu-
122 tion of the United States, providing that a person shall not be deprived of property without due process of law; whereas in fact and in law the said act and statute is repugnant to section I, of article XIV of the amendments to the Constitution of the United States; and further that whereas the property of the said plaintiff, as shown by said record and proceedings consists of rights and easements of light, air and access in and over Park or Fourth avenue, a public street in the city of New York, appurtenant to the premises of the said plaintiff in error, abutting on said avenue, the said court of appeals of the State of New York erred in deciding in favor of sustaining the validity of said act and statute of said State, the effect of which has been to deprive said plaintiff of said property without due process of law.

V. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under chapter 339 of the Statutes of 1892 of the State of New York, namely, the authority to take by or on behalf of the defendants in error and defendants below, the said plaintiff's property, consisting of rights and easements of light, air and access appurtenant to his said premises, without compensation to him and with-

out due process of law, in violation of section I of article XIV of the amendments to the Constitution of the United States.

123 VI. That the said court of appeals of the State of New York erred in holding and deciding that the said State had authority and that the authority exercised by the State and under the statute aforesaid was valid to compel or allow defendants in error to maintain a railroad viaduct and to operate trains of cars thereon in front of said property rights and easements, of the said plaintiff in error and that the said defendants in error were under no liability to compensate said plaintiff in error therefor, or for the injury inflicted upon his said premises by reason of such maintenance and operation, and that the taking of a portion of the property of the plaintiff in error in the manner complained of, was and could be made valid by statute, that is by chapter 339 of the Laws of 1892 of the State of New York; and that said holding and decision of said court of appeals, was, and is repugnant to section I of article XIV of the amendments to the Constitution of the United States.

VII. That the said court of appeals of the State of New York erred in holding that chapter 339 of the New York Laws of 1892 is constitutional and that it does not contravene section 10 of article I of the Constitution of the United States forbidding the impairment of the obligation of contracts; whereas in fact and in law the said act is repugnant to the said section in that it does impair the obligation of a contract, namely, the contract under which Park or Fourth

124 avenue in the city of New York was dedicated as a public street in and by the deed from Pater Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827, and set forth in the record of the proceedings herein; and said statute further impairs the obligation of the contract existing among the parties to this action arising from the fact that the said parties all claim title under said Peter Poillon through conveyances which recognize and establish the property rights of the plaintiff in error as aforesaid.

VIII. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said statute and under chapter 339 of the Laws of the State of New York, of the year 1892, whereby the easements and rights of the property of the plaintiff in error aforesaid were taken and appropriated by defendants in error and thereby he was deprived of said property rights and easements without compensation, for the reason that said authority was repugnant to section 10 article I of the Constitution of the United States, in the respect that it impairs the obligation of said contracts in last assignment referred to.

125 IX. That the said court of appeals of the State of New York erred in holding and deciding that the defendants in error were and are under no liability to compensate the plaintiff in error for the damages and injury inflicted upon his said premises by reason of either the erection, maintenance and operation of said viaduct

structure or the operation of trains in front of plaintiff's premises and in holding and deciding that said defendants were and are protected from such liability by the authority of a statute of said State, namely, chapter 339 of the Laws of 1892 thereof, such decision being repugnant to the Constitution of the United States and to section 10 of article I and to section I of article XIV thereof.

Wherefore, the said Patrick Kierns, plaintiff in error, prays that the said judgment of the said court of appeals of the State of New York be reversed, annulled and altogether held for nothing and that he may be restored to all things which he has lost by occasion of the said judgment, etc., and that he may have such other and further relief, according to law, as to the court may seem just and proper.

HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York.

125½ [Endorsed:] In the Supreme Court of the United States. Patrick Kierns, as executor &c., plaintiff in error, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error. Orig. Assignment of errors. Rec'd N. Y. supreme court Feb. 1 1904 Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within assignment of errors is hereby admitted this 30th day of January, 1904. (Over) —— ——, attorney and solicitor for defendants in error The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company. Rec'd copy Jan'y 30, '04. Ira A. Place, att'y for def't R. R. Cos.

126 In the Supreme Court of the United States.

PATRICK KIERNS, as Executor and Trustee under the Will of John Kierns, Deceased, Plaintiff in Error, Representing Original Plaintiff,

against

THE NEW YORK & HARLEM RAILROAD COMPANY and The New York Central & Hudson River Railroad Company, Defendants in Error & Original Defendants.

} Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Patrick Kierns respectfully shows:

That your petitioner is a resident and citizen of the city and State of New York, and is executor of and trustee under the will of John Kierns, late of the county of New York, deceased; that said John

Kierns died on or about November 1, 1901, leaving a will which was duly admitted to probate in said county on November 21, 1901, and under and by which your petitioner was appointed executor of said will, and that in and by the terms thereof, the property hereinafter mentioned was devised to your petitioner in trust, for the uses and purposes therein mentioned. That the said deceased, John Kierns, was at all the times hereinafter mentioned prior to his said death, the owner — certain valuable land and premises situated in the borough of Manhattan, city, county and State of New York, and abutting upon Park avenue, a public street in said borough and
127 city, was at the times hereinafter mentioned, the owner of certain easements in said avenue of light, air, access, etc.; that prior to the commencement of the above entitled original suit or action the defendants therein, the defendants in error above named, The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, had been for a long time maintaining and operating an elevated railroad in said street or avenue in front of said testator's said premises.

That on or about September 14, 1897, said testator commenced said action against said defendants in the supreme court of the State of New York to recover the damages sustained by him by the said maintenance and operation, whereby said testator claimed that the said easements had been taken and impaired by said defendants unlawfully and without due compensation, and to recover an injunction against the further maintenance and operation of said elevated railroad, as appeared by the complaint of said testator in said action. Said defendants appeared and as a defense to the complaint in said suit or action, interposed an answer setting up in substance the provisions of certain acts of the legislature of the State of New York, namely, chapter 339 of the Laws of 1892, and amendments thereof, as command and authority to defendants to maintain and operate said elevated railroad.

That under the practice in said New York supreme court, no further pleading and no reply to said defense was allowed or required.

128 That said action came to trial thereafter in said supreme court at a special term thereof on the 5th day of November, 1900, before the Hon. Abraham R. Lawrence, justice, and thereupon and on January 14, 1901, the trial court overruled said defense and held the same to be invalid, and gave judgment in favor of the plaintiff for an injunction and for $1639.32 damages, and for other relief.

That upon appeal duly taken by both parties to the appellate division of the supreme court for the first department, the said judgment was duly affirmed and judgment of affirmance thereof entered on May 7, 1901.

That from said judgment of affirmance both parties thereupon appealed to the court of appeals of the State of New York, the same being the highest court of said State in which a decision in the suit could be had. Whereupon the said court of appeals on

February 24, 1903, made a final judgment or decree in said suit or action, directing that the said judgment of the appellate division of the supreme court so appealed from be reversed and plaintiff's complaint be dismissed, and that the record be remitted to the supreme court of the State of New York to be enforced according to law; that said record was thereupon so remitted accordingly, and thereafter and on March 31, 1903, final judgment was entered in and by said supreme court in obedience to the judgment of the court of appeals and according to the law and practice of the State of New York, whereby it was adjudged that said judgment of the court of appeals be made the judgment of the supreme court, and that the judgment previously rendered in favor of said testator by said supreme court be reversed and said testator's complaint be dismissed as aforesaid.

129 That in said court of appeals there was drawn in question the validity of the said statutes of the State of New York and the authority exercised thereunder by defendants on the ground of their being repugnant to the Constitution of the United States and the decision was in favor ofthe validity of said statutes and the authority exercised thereunder; that in said court of appeals it was claimed on behalf of said testator that the said acts of the legislature directing the taking of private property without due process of law and therein offended against the provision of the fourteenth amendment of the Constitution of the United States, and that they contravened the provisions of the Constitution of the United States, which forbid the impairing of the obligation of a contract, namely, section 10 of article I, of said Constitution.

That thereupon said court of appeals in said suit or action and in its decision therein, overruled the said claims of said testator and decided in favor of the validity of said statute and the authority exercised thereunder.

That notwithstanding the death of said testator John Kierns, pending the said appeals, there was no substitution of parties, and the proceedings were carried on in his name, as aforesaid.

Wherefore your petitioner prays for a writ of error directed to the supreme court of the State of New York, commanding that court to send a record of the proceedings in the said suit or action aforesaid, and all things concerning the same, to the justices of the

130 Supreme Court of the United States and for the usual citations and supersedeas to the end that the record of the proceedings being inspected the said justices of the Supreme Court of the United States may cause further to be done therein to correct all errors what of right and according to law and the law and Constitution of the United States ought to be done.

And your petitioner will ever pray.

PATRICK KEIRNS.
HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York City.

STATE OF NEW YORK,
County of Suffolk, Eastern District } ss:
of New York,

Patrick Kierns, being duly sworn, says:
That he is the plaintiff in error herein; that the foregoing petition is true to the best of his knowledge, information and belief.

PATRICK KEIRNS.

Sworn to before me this 11th day of December, 1903.

S. B. GRIFFEN,
Notary Public, Suffolk Co., N. Y.

Allowed this 7th day of January, 1904.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

131 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which John Kierns is plaintiff and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company are defendants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals in the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered February 24, 1903, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between John Kierns, plaintiff, and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants, and which has been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of the statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the damage of the said John Kierns, and of his estate, and of his executor and trustee Patrick Kierns, as by complainant's complaint appears; we
132 being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties

aforesaid in this behalf, do command you, if a judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of January, in the year of our Lord one thousand nine hundred and four.

Allowed by

ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

132½ [Endorsed:] In the Supreme Court of the United States. Patrick Kierns, as executor, plaintiff in error, representing original plaintiff, against New York & Harlem Railroad Company & The New York Central & Hudson River Railroad Company, defendants in error & original defendants. Orig. petition and writ of error. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Rec'd N. Y. supreme court Feb. 1, 1904. Service of a copy of the within petition and writ of error is hereby admitted this 30th day of January, 1904 (Over) ——— ———, attorney and solicitor for defendants in error. The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company Rec'd copy Jan'y 30/04 Ira A. Place att'y for def't R. R. Cos.

133 Citation.

UNITED STATES OF AMERICA, *ss:*

To the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of New York, wherein Patrick Kierns is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this seventh day of January in the year one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

133½ [Endorsed:] In the Supreme Court of the United States. Patrick Kierns, as executor, plaintiff in error, representing original plaintiff, against New York & Harlem Railroad Company & The New York Central & Hudson River Railroad Company, defendants in error & original defendants. Orig. citation. Rec'd N. Y. supreme court Feb. 1, 1904. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within citation is hereby admitted this 30th day of January 1904 (Over) Rec'd copy Jan'y 30/04. Ira A. Place, att'y for def't R. R. Co's, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

134 Know all men by these presents: That we, Patrick Kierns, of the county of Suffolk, and State of New York, as principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, both corporations organized under the laws of the State of New York, in the full and just sum of five hundred dollars ($500.00), to be paid to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, their certain attorney, successors or assigns; to which payment well and truly to be made, the said Patrick Kierns binds himself, his heirs, executors and administrators, and the said The United States Fidelity and Guaranty Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of December, in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at a plea in the court of appeals of the State of New York, held at Albany, New York, on February 24, 1903, in a suit depending in the supreme court of the State of New York, between John Kierns, original plaintiff, and The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, a judgment upon return from said supreme court was rendered against the said John Kierns and

135 in favor of the said New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, dismissing his complaint without costs, and the said Patrick Kierns having obtained a writ of error, and filed a copy

thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Patrick Kierns shall prosecute said writ of error to effect, and answer all costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

PATRICK KIERNS,
By ATWATER & CRUIKSHANK, His Att'ys.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, Manager.

{Seal of the United States Fidelity & Guaranty Company. Incorporated 1896.}

Attest:
GEORGE E. HAYES,
Attorney-in-fact.

Sealed and delivered in the presence of
F. B. WOOD.

136 STATE OF NEW YORK, }
County of New York, } ss:

On this 28th day of December, 1903, personally appeared before me Alfred B. Cruikshank, one of the firm of Atwater and Cruikshank, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[Seal of Fred. Koch, Notary Public, New York County.]

FRED. KOCH,
Notary Public, New York County.

STATE OF NEW YORK, }
County of New York, } ss:

On the 18 day of Dec., in the year 1903, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation,

and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Sylvester J. O'Sullivan, further said that he was acquainted with George E. Hayes, and knew him to be the attorney-in-fact of said company; that the signature of said George E. Hayes, subscribed to the within instrument, is in the genuine handwriting of said George E. Hayes, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Sylvester J. O'Sullivan.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

STATE OF NEW YORK, }
County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Alonzo G. Oakley whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a commissioner of deeds in and for the city of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such commissioner, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court and county, the 19th day of Dec. 1903.

[Seal of New York.]

THOS. L. HAMILTON, Clerk.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the ninth day of November, A. D., 1903, at the office of the company, in the city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Leonidas Dennis, or Charles W. Young, or George E. Hayes, or W. C. Schuyver, or Gilman Ashburner, or H. C. Nash, attorneys-in-fact of this company in the State of New York, be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or pro-

ceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, County of New York, } ss:

I, George E. Hayes, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said resolution.

Given under my hand and the seal of the company, at the city of New York, this 18 day of Dec. 1903.

GEORGE E. HAYES,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C., at the Close of Business, September 30, 1903.

Assets.

Investments, stocks and bonds (market value)	$1,933,501.56
Cash on hand and in banks	117,033.44
Collateral loans	150,935.00
Real estate	264,929.07
Loans on mortgage	41,925.00
Mortgages and other collateral sc. salvage	4,035.00
Agents' balances, fidelity and surety, less commissions	228,913.30
Agents' balances, burglary, less commissions	50,136.91
Due for subscriptions, department of guaranteed attorneys	33,320.05
Advanced sc. contracts, secured	399,395.26
Interest due and accrued	17,756.31
	$3,249,915.50

Liabilities.

Capital stock paid in cash	$1,000,000.00
Cash collateral deposits	96,749.44
Surplus and reserve	1,457,166.06
	$3,249,915.50

STATE OF NEW YORK, County of New York, } ss:

George E. Hayes, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of September 30th, 1903, and that the financial condition of said company is as favorable now as it was when such statement was made.

GEORGE E. HAYES.

Subscribed and sworn to before me this 18 day of Dec. 1903.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

136½ [Endorsed:] Patrick Kierns and the United States Fidelity and Guaranty Company to the New York and Harlem Rail-

road Company and the New York Central and Hudson River Railroad Company. Penalty $500.00. Dated, December 18, 1903. Approved Jan'y 7 1904 Alton B. Parker Ch. J. Rec'd copy Jan'y 30/04. Ira A. Place att'y for def't R. R. Co's. Atwater & Cruikshank, attorneys at law, 48 Cedar street, New York city. Rec'd N. Y. supreme court Feb. 1 1904 Service of a copy of the within undertaking is hereby admitted this 30th day of January 1904. —— —— attorney and solicitor for defendants in error The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

137 UNITED STATES OF AMERICA:

Supreme Court.

STATE OF NEW YORK, }
County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court in said county, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, ending with No. 119, contain a true and complete transcript of the record and proceedings had in said supreme court and in the court of appeals of the State of New York in the cause of Patrick Kierns, plaintiff in error, representing John Kierns original plaintiff below, against The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error and defendants below, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the defendants in error and undertaking to prosecute said writ of error and copy of the opinion of said court of appeals, all of which were filed in the office of said clerk on the 1st day of February, 1904, and constitute the return to said writ of error.

M. J. D.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 2nd day of February, A. D. 1904.

[Seal of New York.]

THOS. L. HAMILTON,
Clerk of the Supreme Court in the County of New York.

[Endorsed:] In the Supreme Court of the United States. —— —— against The New York & Harlem Railroad Company & ano., defendants in error. County clerk's certificate.

Endorsed on cover: File No. 19,260. New York supreme court. Term No. 203. Patrick Kierns, executor and trustee of John Kierns, deceased, plaintiff in error, vs. The New York and Harlem Railroad Company & The New York Central & Hudson River Railroad Company. Filed March 3rd, 1904. File No. 19,260.

Come now The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, and move the Supreme Court of the United States that No. 202 of this Term be put back upon the call

17th of April, 1905.

SIRS:

On the 17th of April, 1905, I will move the Supreme Court of the United States that the above rule be granted.

Yours very truly,

IRA A. PLACE,
Attorney for the Defendants.

To Messrs. ATWATER & CRUIKSHANK,
Attorneys for the Plaintiff in Error.

Come now The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, and move the Supreme Court of the United States that No. 203 of this Term be put back upon the call.

17th of April, 1905.

SIRS:

On the 17th of April, 1905, I will move the Supreme Court of the United States that the above rule be granted.

Yours very truly,

IRA A. PLACE,
Attorney for the Defendants.

To Messrs. ATWATER & CRUIKSHANK,
Attorneys for the Plaintiff in Error.

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IN THE

Supreme Court of the United States.

ALICE I. BIRRELL,
original plaintiff
and
plaintiff in error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
original defendants
and
defendants in error.

October Term, 1904.
No. 202.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case before this Court.

This case comes up upon a Writ of Error to the Supreme Court of the State of New York, allowed by Chief Judge Parker of the Court of Appeals to review a final judgment entered upon a decision of the Court of Appeals reversing a judgment of the Appellate Division of the N. Y. Su-

preme Court, affirming a judgment at Trial Term in Equity in favor of the plaintiff.

This is one of what are known as the *Viaduct* cases, founded upon the claims of abutting property owners growing out of the construction of the Fourth Avenue Viaduct or Elevated Railroad in New York City, by the N. Y. & Harlem Railroad Company, and the questions raised upon this appeal are substantially the same as arose and were decided in the *Muhlker* case, No. 99, this term of Court, decided April 10, 1905.

The question raised and determined in that case and in this one is whether Chapter 339 of the Laws of New York of 1892, as interpreted by the Court of Appeals of that State, or the authority exercised thereunder, is constitutional in so far as it required the construction of the viaduct in question and the taking of the easements of abutting property owners without compensation.

The Court of Appeals decided in the present case and in the *Muhlker* case that the Act and the exercise of the authority to appropriate such easements thereunder was constitutional and that such easements might be taken without compensation because the construction of such viaduct was a public work performed by command of the State. In the *Muhlker* case this Court overruled the Court of Appeals in that respect and reversed the judgment, remitting the cause to the N. Y. Supreme Court for further proceedings.

Statement of the Pleadings Below.

This action was begun on the equity side of the Supreme Court of New York on January 27, 1897, by the service of a summons and complaint. The

complaint showed that the plaintiff was the owner of a lot with a building thereon situated on the northeast corner of Park Avenue and 123rd street, Manhattan, New York City, that said Park avenue had been opened as a public street under Chapter 86 of the Laws of 1813 and amendatory statutes; that by street opening proceedings and the statutes, the title to the street was acquired and is held by the City of New York in trust to be appropriated and kept open as a street; that the plaintiff is possessed of easements appurtenant to said premises to have the avenue kept open and used in like manner as other public streets and avenues, and that there are attached to said premises easements of light, air and access, over the avenue, for the benefit of the premises and of the plaintiff which have been so attached during her time and that of her predecessor in title; that the defendant the Harlem Railroad was operating a steam railroad on the avenue prior to April 1, 1873, when it leased the same to the New York Central and Hudson River Railroad for a term of 401 years; that subsequently to that lease the defendants, without right or authority, as against the plaintiff or her predecessors excavated Park avenue and constructed a railroad in the cut and that about April, 1893, they erected the viaduct in question, on which they are operating and intend permanently to operate their railroad, whereby the premises have been and will be deprived of easements of light, air, access, privacy, stability, quiet and other rights, without the consent of the plaintiff and without compensation to her. The prayer demanded damages for the trespasses already committed and an injunction for the future.

The answers of the two railroad companies were the same and admitted the street opening proceedings and that Park avenue was a street held in trust and that defendants were operating a steam railroad thereon; but denied the street use or trust as to the portion of the street occupied by the railroad; alleged the title of the defendants to the fee of a twenty-four foot strip in the center of the avenue, and set up as an affirmative defense that the viaduct was erected and operated in compliance with the Act of April 19, 1892, of the New York Legislature. The answers also set up the various statutes of limitation and a claim to title by prescription.

Prior to the trial in this case and in February, 1900, the Court of Appeals in the case of Lewis *v.* the Harlem R. R. Co. had unanimously affirmed a judgment against the defendants in an action by an abutting property owner substantially identical in form and substance with the present case.

Lewis *v.* Harlem R. R. Co., 162 N. Y. 202.

This case was tried and decided by Mr. Justice Lawrence who filed his findings and decision, January 14, 1901.

The trial judge found that by decree in Chancery dated December 28, 1832, the Harlem Railroad became the owner of a strip of land twenty-four feet wide running north and south through the centre of Park Avenue in front of plaintiff's premises and upon that strip had the right to erect the present viaduct structure. He also found that by reason of the lapse of time and acquiescence of the plaintiff and by virtue of all the acts and proceedings in the premises the de-

fendant companies had acquired the right to use and operate the remaining part of the railroad as it was prior to August 1894 maintained and operated in a cut along the centre of the avenue about fifteen feet in depth and fifty feet in width; that in compliance with the Act of 1892 and under the supervision of the Park Avenue Improvement Board, the present viaduct structure was erected, being about 21 feet 9 inches in height and varying from 60 feet 10 inches in width at the south end of the plaintiff's premises to 75 feet feet 3 & ½ inches in width at the northerly end; that defendants began to operate their trains on said permanent structure on February 16, 1897 and intend to continue said operation; that such permanent structure and operation are trespasses upon plaintiff's easements of light and air appurtenant to the premises, whereby the fee value has been depreciated in the sum of $7050 and that the loss of rental value was $3360. These damages referred solely to that part of the roadway not included in the strip of twenty-four feet and were over and above all benefits conferred upon said premises by the erection and operation of the viaduct, as compared with the former structure (*Record, p.* 17 *Decision par. sixth;* opinion of Judge Lawrence, record, p. 21).

Upon this decision judgment was entered January 14, 1901, for the amount of rental damage and costs and for an alternative injunction in case the sum of $7050 fee damage was not paid; the plaintiff to furnish an appropriate grant or conveyance of the right to operate and maintain the structure on payment of the same and either party to have leave to move at the foot of the judgment for further directions.

The defendants excepted to the decision and

appealed to the Appellate Division of the Supreme Court, consisting of five Judges and being the final tribunal in the State of New York on matters of fact, and there the judgment was affirmed with costs without opinion (*60 App. Div., 630*), Mr. Justice Van Brunt dissenting.

The defendants then appealed to the Court of Appeals where the judgment was reversed and the complaint dismissed without costs upon the authority of *Fries vs. N. Y. & H. R. R. Co.*, 169 N. Y., 270, decided December 31, 1901, which limited the *Lewis Case*, 162 N. Y., 202, wherein a similar judgment in favor of plaintiff had been unanimously affirmed and which had theretofore been regarded as a complete and absolute authority in this line of cases. The *Fries* case was decided by a majority of the Court, Judge Cullen, the present Chief Judge, dissenting in a strong opinion, concurred in by Judges Bartlett and Vann; said three dissenting Judges holding that the defendants were liable and that the judgment appealed from should be affirmed following the Lewis case.

The Court of Appeals, in its judgment directing the dismissal of this case, stated,

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892, and the Acts amendatory thereof, and all the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States and particularly to Sec. 1 of Art. 14 and the amendments thereto, and of Sec. 10, Art. 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

How The Constitutional Question Comes Up.

The complaint simply alleges the plaintiff's title to the property and easements, and trespasses committed and leaves the defendants to make such defense and answer as they see fit. The answer of the defendants alleges the New York Act of 1892 under which they claim the right to appropriate the easements without compensation and upon which that claim was sustained in the Court of Appeals. Under the New York practice nothing further could appear in the pleadings. A plaintiff is not allowed to reply to an answer unless he has a counterclaim and there was no counterclaim here. (*Code Civ. Pro., Sec.* 514), but every allegation of new matter in the answer in such a case is deemed to be controverted by the adverse party (*Code Civ. Pro., Sec.* 522). The result of this system of practice is that it "secures "to the plaintiff the benefit of every possible "answer to the defense made by way of new mat- "ter, not constituting a counterclaim as fully as "though it were alleged in the most perfect man- "ner." (*Arthur* v. *Homstead Fire Ins. Co.*, 78 N. Y., 462, 467).

The unconstitutionality of the State statute in so far as it operated to deprive the plaintiff of compensation for her easements was assumed in the Supreme Court by the trial Judge and by the Supreme Court Appellate Division. It was presented to the Court of Appeals and decided there as the remittitur shows and thereby the Federal question was sufficiently presented for cognizance of this Court (*Rothschild* v. *Knight*, 184 U. S., 334).

Assignment of Errors.—The errors of which the plaintiff complains herein are all fully set forth

by the assignment of errors (see Record, 67 and 70), namely, that the New York Court of Appeals held that Chapter 339 of the Laws of 1892 of the State of New York is constitutional, and that the plaintiff in error had no remedy against the defendant, and that he might be and has been deprived of his property without due process of law, and that the Court of Appeals decided in favor of the validity of the authority exercised under said statute, namely, the authority to appropriate plaintiff's easements of light, air and access, without compensation, and without due process of law. The error of the Court of Appeals is fully alleged in various forms in the said assignment of errors, so that the matter involved is fully and squarely brought before this Court for determination.

Facts of the Controversy.—The plaintiff's premises consist of a five story and basement red brick apartment house, situated on the northeast corner of 123rd street and Park avenue, Manhattan, New York City. The lot is thirty-five feet on the street and one hundred feet eleven inches on the avenue. The building is thirty-five feet front by ninety feet deep. It is a double flat house with ten apartments. One apartment has seven rooms and bath and nine apartments have eight rooms and bath each. It was built in 1882 about the time of the decision in the case of *Story v. N. Y. Elevated R. R. Co.* (90 N. Y., 122), which was supposed to secure to abutting property owners their easements of light, air and access in the streets of New York forever. There are fifty windows on the Park avenue side, twenty-four on 123rd street and twenty on the back of the building. The premises are in good repair

and have been so ever since they have been owned by the plaintiff, who purchased them in 1893.

Prior to 1872 the trains were operated on Park avenue at this point upon the surface of the road from 42nd street to across the Harlem River (about 135th street). In 1872 a cut was constructed from 49th street to the Harlem River and the trains were operated in that cut, which at 123rd street opposite the plaintiff's premises, was about fifteen feet deep (Record, p. 43). There was a parapet wall about two feet six inches high at that point at each side of the cut. At the bottom the cut was fifty feet wide and at the top, fifty feet. This cut was bridged over at 123rd street, 124th and 125th streets (Record, p. 24). A person standing on the sidewalk at the corner could just see the smokestack of a locomotive but not the tops of the cars passing through the cut.

In 1893 the work was begun of changing from the cut to the present viaduct structure. In May, 1894, they commenced to build a wooden trestle work over the cut as a temporary support to the present permanent structure and as an aid to its erection (Record, pp. 24, 25).

The present structure was put in operation February 16th, 1897. It widens from the southerly line of the plaintiff's property on Fourth avenue to the northerly line thereof. At the southerly line it is sixty feet, ten and three-quarter inches wide and at the northerly line it is seventy-five feet three and a half inches wide (Record, pp. 25, 44). The height of the structure at this point is twenty-one feet nine inches (Record, p. 44). It is built of iron or steel. There are nine iron columns supporting the structure on the street in

front of plaintiff's premises, consisting of three rows of three columns each, each column being 24 inches square (Record, p. 25). There are four tracks; two center tracks for express trains and two outside tracks for local trains.

About four hundred and seventy-five trains run over the structure a day of from four to seven cars, the cars averaging about 62 1-2 feet in length. The locomotives weigh from 70 to 90 tons (Record, p. 43).

There is a station at 125th street. The length of the southbound trains brings the locomotives opposite plaintiff's property at about the middle of the building and sometimes further on, and as these trains arrive, stop and leave again the process of firing up at the station with the usual noises attendant upon getting up steam, letting off steam, etc., produce noises additional to the ordinary running of trains (Record, p. 27). Before the viaduct structure was erected, the nuisance of the road was not nearly so great as at the present time. The trains being operated in a cut, there was not nearly so much noise, smoke, gas, nor were cinders driven against plaintiff's windows as they now are from the vantage ground of this high viaduct.

From 1893 to the present time there has been a great deal of noise, smoke, cinders and dust. Cinders by the pailful accumulate every day in the area, on the window sills and on the roof (Record, pp. 26, 27); a number of boxes of these cinders were produced in evidence (Record, p. 27), some of the size of a small hickory nut.

The noise of the operation of the trains is such as to interfere seriously with conversation (record, pp. 26, 28. 30, 31, 32, 33, 34).

The effect of the passing trains upon the light is such as to produce alternate flashes and darkening, and to interfere with reading (record, pp. 32, 34).

The effect of the vibration is very serious indeed; plaster has fallen down, the walls are cracked, one of the ceilings has fallen and chimneys have been shaken. (record, pp. 27, 30, 31, 35, 36).

A great deal of smoke and gas is produced by the engines at the station and passing, which enters plaintiff's windows, causing interference with the light and affecting the atmosphere so as to produce coughing (record, pp. 26, 31, 32, 33, 34).

A loss of rents of about $1,800 a year was shown; the trial court awarded the plaintiff rental damage at about $1,000 a year. There was evidence tending to show an impairment of the fee damage to the amount of $30,000 or upwards. The award under the rule adopted by the trial court which excluded the damages following the construction and operation of the road upon the twenty-four foot central strip was only $7,050.

History of the case before entry by the Railroad.

In 1807 by Chapter 115 of the Laws of that year, the Legislature provided for the laying out of the proposed streets and avenues in the northerly part of New York (*Plaintiff's Ex. B,* (record, p. 22), by commissioners who were directed to prepare and file a map or plan of the City.

On April 1, 1811, a map was made and filed by the Commissioners appointed under that Act (*Plaintiff's Ex. C,* (record, p. 22). A part of

this map appears in the record showing plaintiff's premises and adjoining streets including Fourth Avenue as then laid out. It was declared by the act to be conclusive as well in respect to the City as in respect to owners and occupants of houses and tenements.

The New York Courts have frequently decided that the filing of such a map pursuant to legislative authority involves a devotion of the lands designated on the map to the corporate use of the municipality or for the benefit of the corporation on whose behalf this map is filed.

Rochester, H. & L. R. Co. v. *N. Y. L. E. & W. R. Co.*, 110 N. Y., 128.
Suburban Rapid Transit R. Co. v. *Mayor, &c., of N. Y.*, 128 N. Y., 510.
Pocantico Water Works v. *Bird*, 130 N. Y., 249.

In 1813 (Chap. 86 Revised Laws) the City Charter was made to provide for the opening of streets under the Act of 1807; that such opening proceedings shall be "final and conclusive upon all the parties and upon all persons whomsoever" and that such streets, &c., should be held in "trust "nevertheless that the same may be appropriated "and kept open for, or as part of a public street, "avenue square or place forever, in like manner "as the other public streets, avenues, squares and "places in the said City are and of right ought to "be" (sec. 177). The moneys expended in the opening were to be assessed upon the parties benefited (Sec. 175). So that plaintiff and her predecessors in title were assessed to open these streets.

A copy of the material parts of these acts is contained in the supplement to this brief.

In 1830 the premises in question now owned by plaintiff were the property of Samson A. Benson an infant from whom by various mesne conveyances plaintiff derived title in 1893 (*Record*, p. 22).

In 1831 the N. Y. & Harlem Railroad Company was incorporated, by Chapter 263 of the Laws of New York, with power to construct a single or double railroad from 23rd street to the Harlem River; to transport passengers and property "*by the power and force of steam or of animals or of* "any mechanical or other power" for the term of thirty years, with power of condemnation of necessary real estate in case of disagreement, etc., the Vice Chancellor to "direct the manner of as- "certaining the damages which the owner of such "land or real estate will sustain by the occupation "thereof by the said corporation," no lands to be thus taken to exceed forty feet in width (*sec.* 10). The act further provided as follows: (*Sec.* 16). "Nothing in this Act shall be deemed to "authorize the said corporation to construct or "use their single or double railroad or way *across or along* any of the streets or avenues as designated on the map of the City of New York, *whether such streets or avenues shall have been opened or not* without the consent of the mayor, aldermen and commonalty of "said city, who are "hereby authorized to grant permission to the said corporation to construct their said railroad way *across or along* said streets or avenues, or prohibit them from constructing the same, and after the same "shall be constructed, to regulate "the time and manner of using the same, and the "speed with which carriages shall be permitted "to move on the same or any part thereof."

In October 22, 1831, the defendant filed in the office of the Register of the County of New York, a map locating the route of this railroad through Fourth Avenue (*Defendant's Ex.* 3), with which was filed a resolution of the common council, passed October 11, 1831, approving said map upon condition that the company "shall first obtain "the consent of the mayor, aldermen and com- "monalty of the City of New York before it com- "mences the construction of said road". Accordingly on December 22, 1831, an ordinance was duly approved by the mayor, authorizing the construction of the railway and thereupon such ordinance was made the subject of an agreement entered into by the defendant companies with the City by which the defendants agreed "to stand "and abide by and perform all the conditions and "requirements in said ordinance contained" (record p. 61).

By this agreement the company is permitted in pursuance of their acts of incorporation, to construct a double or single track railroad or railroads along Fourth Avenue, the width not to exceed twenty-four feet, provided that if it should appear that said railway constituted "an obstruction or impairment to the future "regulation of the City *or the ordinary use of any street or avenue,* it might be required to remove the railway." The right of regulating the description of the power to be used was reserved to the City. Further; "that said company shall make the railroad path from time to time to *conform to what may "hereafter be the regulation of the avenue and "road through which the railroad passes".* If the railroad should not be completed or should be discontinued, the strip of land was to be thrown open as a part of the public avenue.

Those rights which the City conferred upon the railroad had been described as "subject to certain "drastic conditions which gave the City supreme "control" Vann, J., in *Lewis* case, 162 N. Y, 219.

In certain litigations arising out of the enforcement of the conditions contained in these ordinances, it was held that they were valid and effectual and must be observed by the railroad companies.

N. Y. & H. R. Co. v. *Mayor &c of N. Y.*, 1 Hilton (N. Y. Com. Pleas) 562.

N. Y. N. H. & H. R. R. Co. v. *Mayor &c. of N. Y.* 4 Blatch., 193, 18 Fed. Cases 142; case No. 10199.

History of the case after entry by the Railroad.

Under the act, ordinances and agreement the railroad in 1832 entered upon the street and built a surface railroad along the street and it continued to be only a surface railroad until 1873. This is the testimony of the defendant's manager, Franklin, "Prior to 1872 the trains operated in "Park Avenue at 123rd street ran on the surface. "About 1847 they went down into the cut in front "of 123rd street" (*Record, p.* 43).

It was a modest surface railroad of the old fashioned kind with small and infrequent trains of the character which old men remember to have been used in those days.

On April 6, 1832, the N. Y. & Harlem Railroad began proceedings to acquire title to a twenty-four foot strip in the centre of Fourth Avenue in front of the plaintiff's premises. The fee at that time was in one Samson A. Benson, an infant un-

der the age of fourteen years (*see Condemnation proceedings, Def'ts'* Ex. 2, record pp. 50-58). A final decree in that proceeding was entered February 16, 1833 (record p. 58). It recites that the railroad company had located its railroad *in the centre of Fourth Avenue* with the approval of the common council (record p. 50) and that "in order to keep the line, course road or way thereof, the railroad required the fee simple of this strip, and it was finally adjudged that the railroad company should take the fee simple thereof and might enter upon, take and use the same *for the purposes of said road* (Record, p. 58).

In 1837 Chapter 274 was passed authorizing the widening of Fourth avenue to one hundred and forty feet; the statute treating the whole street as one hundred and forty feet in width notwithstanding the condemnation proceedings against the infant Benson. The language of the statute is that the map of the City of New York should be altered to show Fourth avenue as a street one hundred and forty feet in width "by adding there-"to on each side thereof twenty feet of land so as "to make the whole width of that part of said "avenue one hundred and forty feet," showing the understanding of the situation to be that the bed of the railroad should form and did form a part of Fourth avenue at that time.

By proceedings which terminated in an order confirming the report of the Commissioners on May 15, 1853, and an order of the General Term of the Supreme Court affirming that order, dated May 15, 1854, the City acquired title to the soil of Fourth avenue (record, p. 22). These proceedings included the strip of twenty-four feet in width in the center of Fourth avenue opposite the

premises in suit. A nominal award of one dollar was made the railroad in those proceedings.

In the case of *Pape v. N. Y. & H. R. R. Co.*, 74 App. Div., 175, 186, decided in the Appellate Division of the Supreme Court of New York, Mr. Justice Ingraham construed these proceedings and says: "It would seem, therefore, that after final "determination of the report of the commission- "ers the railroad company retained no interest in "this property that it had acquired from Adri- "ance (the original owner in that case) except the "right to exercise its franchise by the operation "of a railroad upon the surface of the street."

In 1872, Chapter 702 of the Laws of New York, entitled "An Act to improve and regulate the use "of Fourth avenue in the City of New York," authorized the railroad company to lay down two additional tracks and prescribed the lowering of the grade from 105th street up to 120th street and past the plaintiff's premises, with a provision for bridges and cross streets and for parapet and retaining walls, with coping and iron railings whenever the railroad ran through an open cut, the expense to be borne by the city and railroad in equal proportions.

In 1873 the lease to the N. Y. Central Railroad was made.

In 1880 plaintiff's building was erected.

In 1890 the River and Harbor Act was passed (*U. S. Statutes at Large*, Vol. 26, p. 437) requiring the elevation of the defendants bridge over the Harlem River.

In 1892 Chapter 339 of the Laws of 1892 (amended 1894, Chap., 548; 1896, Chap. 594; 1898, Chap., 613) authorized the erection of the viaduct structure in question and provided (Sec-

24)"that sai dimproved structure and bridge shall "be *exclusively for the use and purposes of the "railroad company.*"

In May, 1894, the work under this act began opposite plaintiff's premises (record, pp. 24, 25) and was terminated on February 16, 1897, when trains began to be operated on the permanent structure.

In the present action plaintiff was not allowed ot recover any damages whatever by reason of the construction or operation of the road upon the twenty-four foot strip in the center of Fourth avenue, nor by reason of the construction of the temporary structure between the years 1894 and 1897, on the theory that such construction was under the control of the State of New York. Her recovery was limited to the damage accruing and commencing on February 16, 1897, the day when the defendant companies took possession of the road.

FIRST POINT.

The decision in the Muhlker case is controlling, and requires a reversal of this judgment.

The questions presented to this Court by the writ of error and assignment of errors are substantially the same as those presented in the *Muhlker* case. The remittitur from the Court of Appeals in this case states the Federal question as follows:

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892, and the acts amendatory thereof and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly of Sec. 1 of Art. 14 and the amendments thereto, and of Sec. 10, of Art. 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

And the decision in this respect is made the ground of the application for the writ of error by the assignment of errors already referred to.

In the prevailing opinion of this Court, in the *Muhlker* case, it is stated, referring to the decision below:

> "The Court (of Appeals of New York) rests its ruling on one point, the effect of the Act of 1892, under which the structure complained of was erected, the Court declaring that Act a command to the railroad Company in the interest of the public; indeed made the State the builder of the new structure and use of it by the railroads mere obedience to law. But it does not follow that private property can be taken over by the erection of the structure or its use."

From this and the following language of the opinion in the *Muhlker* case it is clear and certain that the question decided in that case was the question attempted to be raised here; that is, the validity and constitutionality of Chapter 339 of the Laws of 1892 of the State of New York. The facts in both cases were the same. In both cases

the easements consisted of light and air appurtenant to premises fronting on Fourth avenue, New York City. In both cases these easements have been appropriated by the defendants without compensation, and in both cases that appropriation was attempted to be justified under Chap. 339 of the New York Laws of 1892, which directed the erection by defendants of a viaduct, in the course of which erection these easements were necessarily taken.

SECOND POINT.

Following the Muhlker decision, it must be held that the judgment of the New York Court of Appeals in this case contravenes the several provisions of the federal constitution invoked by the plaintiff in error.

The provisions of the Federal Constitution under which plaintiff in error claims the right to a review and a reversal in this Court are the two mentioned, namely, that no state shall pass any law impairing the obligation of contracts (Art. 1, Sec. 10), and that no state shall deprive any person of property without due process of law (Am. 14).

In this case the application of these several provisions is scarcely distinguishable. All three are intended and effective to protect property and property rights. A contract is property, and all property, except that of the most primitive kind,

is the result of contracts, and of services performed under contract. Substantially all property depends for its existence upon the performance of present contracts, and may be destroyed by their violation. The judgment under review sustained the validity of the state law (Chap. 339 of the Laws of 1892), which authorized the erection of the viaduct complained of, without compensation, and also sustained the acts performed and the authority claimed under it.

In the suit below there had been drawn in question the validity not only of the statute *but of the authority exercised under the same* (U. S. R. S., Sec. 709, Record, p. 1 Remittitur). By this authority exercised under the statute the property of the plaintiff was taken without compensation, and without process of law. It is not even pretended that compensation was provided, nor that there was any process of law whatever.

Now it has been held by the decision in the Muhlker case that the easements taken were in fact property. The opinion cites approvingly *Barnard* vs. *Johnson*, 15 *N. J. Eq.*, 481. and Lewis "*Eminent Domain*," Sec. 91-C
where it is stated that

> "These rights or easements of light, air and access as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Similarly under the opinion in the *Muhlker* case, the effect of the New York Statute was to impair the obligation of a contract. It was held in that case that the City of New York held the street under a trust which constituted a contract to the

benefit of which plaintiff was entitled. There is no difference in substance between the situation of the plaintiff here and that of Muhlker. In both cases their predecessors in title had bought their land after Fourth Avenue had been dedicated to street uses, in a manner amounting to a contract that the street should be kept open for street purposes, forever, and in both cases the parties had purchased under the assurance of a long line of New York decisions, which had established and formulated the rights of abutting property owners upon streets, including the right to light, air and access.

In the Muhlker case the city had acquired its street rights by a deed in trust. In the present case such rights were acquired by proceedings *in invitum*, but, as was shown in the prevailing Muhlker opinion, that made no difference. Mr. Justice McKenna there points out that in the case of *Story* vs. *Met. El. R. R. Co.*, 90 *N. Y.*, 122; the City was the grantor of the plaintiff, whereas in the latter case of *Lahr* vs. *Met. El. R. R. Co.*, the land in the street had been taken from plaintiff's grantors by proceedings *in invitum*, but in both cases the Court of Appeals properly held that the "rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property." Those conditions appear in the statutes, under which the bed of the street was taken by the city, namely; Chap. 115 of the Laws of 1807; and Chap. 86 R. S., 1813; the former of which provides that they are to be taken in trust, nevertheless, that the same be kept open for a public street, road or public square forever" and the latter of which provides that they are taken

"in trust, nevertheless, that the same may be appropriated and kept upon for or as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city are, and of right ought to be."

THIRD POINT.

The easements of light and air taken by the defendants were the actual property of the plaintiff.

It appears to have been argued by the defendants counsel in the *Muhlker* case that these easements either were not property at all in the constitutional sense or that they were not the property of the plaintiff, and though in fact taken by the defendants as incidental to the building of the viaduct, yet the plaintiff was not thereby deprived of anything which he could call property and deprivation whereof would give him the right to appeal to this Court for constitutional protection.

This is a remarkable claim. Certainly these easements have all the attributes of property in the ordinary sense. They are capable of being used, enjoyed impaired and destroyed and under certain usual conditions of being transferred and exchanged. The mere fact that they have no value apart from the land does not detract from their quality as property. The roof may have only nominal value when considered apart from the house or when removed therefrom. The well and the water therein may have each but

nominal value when separated or the shoe may be valueless without its mate and yet each of these is property and perhaps valuable property in its proper place. The circumstance that the values of certain kinds of property can only be measured by the effect of their loss, does not in the least prevent or recognize the reality of their values when so measured. A man's right hand may have no value apart from the body; its value is only measured by its loss and yet it is none the less capable of legal ascertainment.

And not only is it clear that these easements constitute valuable property but that they are the actual property of the plaintiff. The first and in this case, the controlling proof on that subject is that the plaintiff and her predecessor in title had actually and notoriously possessed and enjoyed these easements as property and had derived revenue therefrom up to the time of the trespasses complained of. Is there any better prima facie proof of property rights than the notorious open and undisturbed and undisputed possession thereof? Such was the possession of plaintiff and predecessors of these easements from the year 1882 when this house was built, up to 1893 when the easements were taken by the defendants. During all that time the plaintiff and her predecessor had uninterrupted open and notorious enjoyment of these easements as property and was deriving large rents therefrom which are set forth in the record. Every passer-by, every agent of the defendants saw or might see this possession every day of his life.

And prior to that time the actual right to these easements existed as far back as the filing of the map by which the street was dedicated. And even

prior to that time at the moment when this lot first became the subject of private ownership there was a potential right in the owner to an easement of light and air upon whatever street his property should thereafter face, this right being founded upon the very commonest habits and customs of civilization. And this property and its notorious enjoyment was never taken from plaintiff or from her predecessors or seriously disturbed until defendants took it by the acts complained of here.

The defendant claims a prescriptive right to their railroad as actually used by them and that right as far as established is conceded; but what of plaintiff's right to these easements founded on not only in prescription but in actual possession?

The Court will look in vain for any assertion of a shadow of a claim on the part of defendants to interfere with those easements made prior to the passing of the act of 1892.

In 1807 the avenue was dedicated to the public use as a street by the statute (Laws 1807, Chap. 115).

In 1811 the map was filed pursuant to this statute, whereby the dedication of the street was perfected.

In 1831 the railroad was allowed to lay its tracks and operate its road through the center of the street by the consent of the common council under what was practically a license. As was said by Judge Vann, in the *Lewis* case (162 N. Y. 221): "It entered under a license and remained under "a license. Its unbroken continuity of possession "from that day to this has never been accompan- "ied with an assertion of any claim hostile to the "city."

In 1832 the railroad condemned the strip of land twenty-four feet wide which was all it used at that time, and on which it operated a surface railroad only.

In 1853 the City condemned that strip and took the title to it under condemnation proceedings, the road being still a surface road.

In 1872 the legislature authorized a change of grade and a four track road.

Now from 1832 to 1872, a period of 40 years, this road had been operated as an ordinary surface railroad (*Testimony of defendants' manager Franklin*, Record,, p. 43. Up to that time there had not been the slightest interference with plaintiff's easements of light and air appurtenant to these premises and very little interference with the access. It was the ordinary case of the operation of a surface railroad. Under the act of 1872 the tracks were sunk and access was interfered with, and the Courts have held that the easements of access then taken from the abutting owners were established by acquiescence and prescription and could not be recovered after twenty years enjoyment by the railroad company, but still the easements of light and air, the taking of which we now complain, had not been disputed. Plaintiff's building was erected in 1882 and plaintiff and the other tenants of these handsome apartments actually possessed and enjoyed those easements for ten years thereafter until this act of 1892.

Therefore they are not only plaintiff's property by right of title but by prescriptive right; by the best of all possible rights that of long notorious and undisputed possession and enjoyment under color of title.

On the defendants by every fundamental rule of law and evidence rests the burden of establishing their right to keep what they seized and took from us by the high hand in 1894; they cannot sustain that burden by mere reference to a State statute; of other defense there is none in this record.

FOURTH POINT.

The New York Court of Appeals had no power to deprive these easements of their full value or character as property, and made no pretense of doing so by its decision herein.

In the *Muhlker* case, defendants' counsel argued that the effect of the decision of the Court of Appeals was that under the local property laws of New York, plaintiff had no easements of light and air in these premises in 1892 capable of being taken by the defendants, and that by that decision this Court was foreclosed from examining into the facts and from deciding that plaintiff's property rights had in fact been invaded by the proceedings under the statute of 1892. Such a construction of the Constitutional provisions referred to would practically amount to their nullification or would permit such nullification or evasion at the option of the State authorities. The provisions of the Federal Constitution are that the State shall not pass any law impairing the obligation of contracts and that private prop-

erty should not be taken for public use without just compensation, nor without due process of law. The remedy is not confined to cases where the State courts *admit* that the Constitution has been violated or deny its principles but extends to all cases where it has in fact been violated. Were it otherwise the Constitutional protection would be of little value.

If private property is in fact taken without process of law or without compensation the citizen is entitled to come to this Court for his remedy even though the State Court may say that which has been taken is not in fact property.

Thus this Court will construe a contract in order to ascertain for itself whether it has been impaired under State authority notwithstanding the State Court construction to the contrary.

McCullough v. Commonwealth of Virginia, 172 U. S., 102.
Columbia Water P. Co. v. Columbia St. R. Co., 172 U. S., 475.

In both these cases it was held that it was the duty of the Supreme Court to look into the record to ascertain what in point of fact was done in the State Courts and whether the Constitution had in fact been violated in the matters complained of.

Here, as a matter of fact, the New York Courts have never for a moment pretended that these easements did not constitute property. The doctrine that easements of light and air appurtenant to real estate in the City of New York and elsewhere do constitute property for the taking of which all appropriate remedies may be had was thoroughly established in the elevated railroad case of *Story v. E. R. Co.*, 90 N. Y., 122, followed

by *Lahr v. El. R. Co.*, 104 N. Y., 268, and by scores of reported and hundreds of unreported similar decisions in that State.

In the present case the trial Court found as a fact, that the plaintiff had owned during the period of her ownership as aforesaid, certain easements of light, air and access in Park avenue and appurtenant to her said premises (*decision, 1st paragraph, p. 16*), and that "the said permanent "structure and the operation of trains thereon "outside of the 24 foot strip are, and since Feb- "ruary 16, 1897, have been, a continuous trespass "upon plaintiff's easements of light and air ap- "purtenant to said premises (*Decision, paragraph 5th, p. 17*). The value of the easements taken was also determined upon substantial evidence and the plaintiff was held entitled to judgment. That judgment was affirmed by the Appellate Division, four judges concurring. This determined the question of fact in the New York Courts.

The Code of Civil Procedure of the State of New York provides as follows (Sec. 191, Sub. Div. 3):

> "The jurisdiction of the Court (of Appeals) is limited to a review of questions of law."

While the Court of Appeals in this case handed down no opinion, yet the Federal Supreme Court, when necessary, will probably take judicial notice of the opinions in the *Muhlker* and other cases. In the *Muhlker* case Chief Judge Parker said, in the prevailing opinion:

> "Although at the time of the decision of the Lewis case we accepted as sound the proposition that when defendant commenced to

> use the steel viaduct it started a new trespass upon the rights of the abutting owners, for which it could properly be held liable, subsequent reflection persuaded the majority of the Court that this was error" (173 N. Y., 553).

and again

> We still think, under the authority of Radcliff's Executors *vs.* Mayor, etc., of Brooklyn, 4, N. Y., 195, and the other cases cited by Judge Martin in his opinion in the Fries case, that the city had power to make its improvement as it did, *without compensation to the abutting owner.*"

Similarly, in the case of *Fries vs. N. Y. & H. R. R. Co., 169 N. Y., 270,* which was the first of these cases where the right of the plaintiff to recover was denied or questioned, it is said in the prevailing opinion, p. 276;

> "I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement *for which the railroad was not responsible.*"

In the case of *Kierns vs. N. Y. & H. R. R., 173 N. Y., 642,* it was simply stated that the judgment was reversed upon the authority of the Fries and Muhlker cases. In the subsequent cases including this Birrell case there was no opinion. It is clear, therefore, that the decision of the Court of Appeals was placed upon the broad ground that the trespasses and the taking of the property of the

abutting owners was justifiable, because done under the authority of the state law, and that that Court never attempted to deny the facts found by the New York Supreme Court of the value of the easements, or to modify those findings in any way. This is further shown, by reference to the dissenting opinions in the same Court. Three of the Judges, Bartlett, Vann and the present Chief Judge Cullen, wrote strong dissenting opinions, from the perusal of which it is evident that there was no doubt in the mind of any member of the Court that the property was actually there and had been confiscated.

Judge Vann said that he regretted the result "as amounting to the confiscation of property belonging to abutting owners, and the gift thereof to railroad corporations". *Kierns case, 173 N. Y., 643.*

Defendants' claim therefore that the constitutional question was not and is not decisive of these cases is untenable.

FIFTH POINT.

Creation of the Easements.

The proceedings for the opening of Fourth Avenue amounted to a contract with the abutting owners.

First, we have the Act of 1807 (*Laws 1807, Chap. 115; p. 275*) providing that the Commissioners' plans, surveys and maps made pursuant

to that Act should be final and conclusive in respect to both the city and the owners of lands within the boundaries of the streets "and in re-"spect to all other persons whomsoever", and this Act was declared to be a public act (*Laws 1807, p. 297*). Pursuant to that Act a map was filed by the said Commissioners, in 1811, which map officially established the streets and avenues of Harlem and represented Fourth Avenue as 100 feet wide (*Record p.* 48).

Following this is Chapter 86 of the Revised Laws of New York of 1813, which provides (*Vol. 2, p. 414*) that when lands in New York City are required for public purposes "the said mayor, "aldermen and commonalty of the City of New "York shall become and be seized in fee of all the "said lands * * * in trust, nevertheless, that "the same be appropriated and kept open for, or "as part of a public street, avenue, square or "place, forever, *in like manner as other public "squares and places in said city are and of right "ought to be.*"

The filing of this map representing the streets, as required by the statute of 1807, and followed by the provisions of the State law of 1813, above referred to, amounted to a dedication of these streets to public street uses forever and to a contract between the public and the abutting owners severally, that the strips of land represented on the map as streets should remain such perpetually, with all the incidents legally appertaining thereto and such has always been the law of the State of New York.

Story v. N. Y. El. R. Co., 90 N. Y., 122; see pp. 160, 172, 177.

Lahr v. Met. El. R. Co., 104 N. Y., 268; see p. 290.

Kane v. N. Y. El. R. Co., 125 N. Y., 164, 177.

These propositions are not seriously contradicted by the defendants. The complaint alleges that Park avenue was a public street opened and established as such, and that the title was held by the City of New York in trust for public use, with certain rights of easements therein set forth, including easements of light, air and access (*Complaint pars. 3 and 4*). There is only a qualified denial of this in the answer, that is to say, a sort of a negative pregnant,—a denial that the *whole* of the strip of land known as Park avenue is now or ever has been a public street and alleging that it was subject to the rights of the defendants to operate their railroad. In none of the State courts has defendant attempted up to the present time to deny the general proposition that the effect of the street opening proceedings in the City of New York was to create a trust as claimed above by the plaintiff herein.

Next, we have in point of time, the agreement of January 9th, 1832, between the N. Y. & Harlem Railroad Company and the City of New York, which embodied the ordinance of the common council on December 22, 1831, distinctly recognizing the existence of Fourth avenue, that it was absolutely subject to regulation and control of the City authorities and that the railroad was to be there by sufferance only. The street rights and easements thus created were recognized and continued without any interference whatever down to 1872, because the use of Fourth avenue for the purposes of a surface road was not inconsistent with street uses and therefore did not legally constitute an interference with said easements.

In 1872 there was a change in the structure of the railroad under legislative sanction whereby

the road was widened and there was a cut made in the street, and parapets were erected to guard the railroad tracks, constituting an interference with the easements of access but of comparatively slight interference with the easements of light and air and said easements of light and air remained undisturbed until 1893 or 1894 when they were appropriated by the defendants in the manner complained of in this case.

SIXTH POINT.

The erection of the Elevated Railroad on Fourth avenue was a perversion of the use of that avenue from its original purpose.

In the *Story* case (90 N. Y., 122, 156) the Court referring to the elevated structure on Pearl street, said: "There was no change in the street surface "intended; but the elevation of a structure use- "less for general street purposes, and as foreign "thereto as the house in Vesey street (*Corning v. "Lowerre,* 6 Johns, Ch. 439) or the freight depot "(*Barney v. Keokuk, supra*)."

In the *Lahr* case (104 N. Y., 268, 288) the Court said that such elevated railroad "is a perversion of the use of the street from the purposes originally designed for it."

So in the *Kane* case (125 N. Y., 164, 176) Judge Andrews in referring to the *Story* case, declared that that decision held and that an elevated railroad "was obstructive of the street uses for which "streets are established."

In the *Fobes* case (121 N. Y., 505) Judge Peckham said at p. 517 "Such a permanent, total, exclusive and absolute appropriation of a portion "of the street as this structure amounted to was "held to be illegal and wholly beyond any legitimate or lawful use of a public street" (referring to the *Story* case.)

Finally, in the *Muhlker* case, decided in this Court April 10, 1905, these decisions are approved and enforced, the Court saying that the *Story* and *Lahr* cases are in point and decisive (*Opinion, McKenna, J.*).

SEVENTH POINT.

The defendants were not under compulsory obligation to erect the viaduct structure complained of.

The learned counsel for the defendant, and a majority of the Judges of the Court of Appeals, were in error in supposing, as they seem to have supposed, that under Chap. 339 of the New York Laws of 1892, the defendants were actually compelled to erect the viaduct structure provided for by that act. The provisions thereof though in form a *command*, were in effect a *permission*.

In the construction of statutes it frequently happens that the word "may" means "shall"; that is to say, that words of permission are to be construed in a proper case as words of compulsion; and so in statutes like the present, granting a monopoly or advantage upon specified terms,

the directory or mandatory words used in stating the *terms* of the permission are to be construed together *with* the permission, and as stating merely the conditions thereof.

It was treated as a permission by the company from the beginning.

The payments for the structure were made half by the defendant Railroad Companies and half by the city, *from time to time* as the work progressed, so that in the construction of the road the defendant company took a voluntary part.

It is not to be assumed that there was an absolute necessity requiring the defendants' railroads to be operated in Fourth Avenue; there was no absolute necessity for the continuance of their depot at 42nd Street. Their terminal could have been removed to 135th Street, north of the Harlem River, with possible advantage to the people of the city. When the station at 42nd Street was originally established it was in the upper part of the residential quarter; as far uptown comparatively, as a station at 135th Street would now be. It was therefore a decided advantage to the Company to be allowed to construct this viaduct as a condition of continuing to occupy its station in Forty-second Street, and to operate its trains therefrom, instead of being required to go off Manhattan Island altogether, as it might and perhaps should have been at that time.

The statute amounted to an offer by the Legislature of New York, to be accepted by the Railroad Company or rejected as it saw fit. It probably required the Railroad Company to vacate the surface of the street which they had previously occupied, but there was no power in the Legislature to compel the Railroad Company to construct

a viaduct there, nor to compel it to accept and use the same when constructed. The only penalty which could have been inflicted upon the Railroad Company, in the case of its declining to accept the proposed scheme, would have been a refusal by the State to allow it longer to continue to occupy Fourth Avenue. It was occupying the street surface under a license from the Legislature and the City authorities, and the effect of the statute was to terminate that license, and to offer a new license for the use of the viaduct structure, upon the terms stated in the Act, including payment by the Railroad Company of half its cost.

That this Act of 1892 was drawn in the interest of the Railroad Company and probably by the Company's officials is evident from a mere reading of the details of the proposed work therein carefully and scientifically set forth. The facts also show that the servants of the road actually supervised the construction. Mr. Katte, a civil engineer in the employ of the Railroad Company, was one of the commissioners and superintending engineer of this work, and as such prepared the plan for the elevation of the tracks (*Record, p. 46*); Mr. Naylor, another civil engineer in the defendant's employ, was the employee of the Board for the Park Avenue Improvement (*Record, p. 44*), and there were probably others.

Upon the completion of this viaduct it was to be the property of the defendant companies, although they had paid but half of its price, and they were clothed with a monopoly of the use thereof, to the exclusion of all other railroads and persons whatsoever.

"Said improved structure and bridge shall be "*exclusively for the uses and purposes of the* "*Railroad Company* (Sec. 24). "No trains of

"other companies, without such permission (of the defendants) shall be run thereon." (Sec. 26).

The command of the Act of 1892 to the defendants was *first* to vacate the surface of Fourth avenue. That command was probably within the power of the Legislature, but whether it was so or not does not concern the plaintiff. The *next* command or permission was to contribute one-half of the price of the proposed viaduct structure in Fourth avenue which was to be used for the sole benefit of the defendants. In that scheme defendants could not be compelled to join. No doubt it was well understood in advance that the scheme was of their contriving or was known to be acceptable to them. By contributing to the construction and accepting the benefits of the plan, and by appropriating the plaintiff's easements in the operation of said scheme, the defendants adopted the responsibility thereof and ought not to be heard to disclaim it.

As was stated by *Judge Cullen* in his dissenting opinion in the *Fries* case "The situation in no "way differs from that which would have been "presented had the Legislature turned the Rail-"road Company off the street altogether, and "made it construct a new line on adjoining prop-"erty. In either case the Railroad would be "bound to pay for what it took."

To put it in another way: If the command of the statute was in substance to defendants to appropriate plaintiff's easements without compensation, then it was illegal and immoral, and they were not bound to obey it. If, on the contrary, the command was, as *Judge Cullen* intimates, upon the theory that they were to pay for the property they took in executing it, then there can be no defense to this action.

EIGHTH POINT.

The Courts, particularly in New York State, are a unit in holding that an elevated railroad cannot be erected and operated by a private corporation on public streets, without compensation to abutting owners.

It is unnecessary to argue this point at length as it will have to be conceded by the defense. A few extracts, however, from a multitude of decisions, mostly in New York courts, will tend to illustrate how this doctrine has been emphasized and enforced:

In the *Story* case, speaking of the power of the Legislature to authorize an elevated railroad structure in a street, Danforth, J., said (90 N. Y., 122, 160):

> "*This cannot be done even by the Legisla-*
> "*ture without compensation to the abutting*
> "*owner.* It would be a perversion of law and
> "reason to construe a trust to keep open land
> "for street purposes as subject to such regu-
> "lations as would destroy the street, or en-
> "able the Legislature or municipality to
> "grant away an exclusive right to any part
> "of it."

On the same subject Tracy, J., declared that the Legislature by virtue of its power to regulate and control the public uses of a street could not divert them to the construction and maintenance of an elevated railroad. He said (90 N. Y., 169):

"This is *a question of power.* If the Leg-
"islature has the power to authorize such a
"structure, without compensation, its exer-
"cise cannot be regulated by the Courts. If
"one road may be authorized to be construct-
"ed upon two series of iron columns placed
"in the street, another may be authorized to
"be supported upon brick columns or upon
"brick arches spanning the street. If a su-
"perstructure may be authorized which spans
"the entire carriageway at fifteen feet above
"the bed of the street, one may be authorized
"which spans the entire street from building
"to building, thus excluding light and air
"from the street and from the property abut-
"ting thereon."

He further says (p. 171):

"The defendant's railroad as authorized
"by the Legislature, directly encroaches upon
"the plaintiff's easement and appropriates
"his property to the uses and purposes of a
"corporation. This constitutes the taking of
"property for public use. It follows that
"such a taking *cannot be authorized*, except
"upon the condition that the defendant makes
"compensation to the plaintiff for the prop-
"erty thus taken."

He also quoted from the opinion of the Supreme Court of the United States in *Railroad Company* v. *Schurmeir* (7 Wall., 272), where that Court says:

"Attempt is also made to justify the acts
"of the respondents (the railroad company)
"as grantees of the State, upon the ground
"that the complainant, in dedicating the
"premises to the public as a street, levee and
"landing, parted with all his title to the same,
"and that the entire title vested in fee in the

"State. Respondents rely for that purpose "upon the statute of the Territory of Minne- "sota. Suppose the construction of that pro- "vision assumed by the respondents, is cor- "rect, it is no defense to the suit, because it is, "nevertheless, true that the municipal cor- "poration took the title in trust, impliedly, if "not expressly, designated by the act of the "party in making the dedication. *They could "not, nor could the State,* convey to the re- "spondents any right to disregard the trust, "or to appropriate the premises to any pur- "pose which would render valueless the ad- "joining real estate of the complainant."

Tracy, J., further added, with reference to the power of the Legislature (90 N. Y., 177):

"The obligation to preserve it as an open "street rests in contract written in the statute "under which the lands were taken, and "which may not be violated by the exercise "of any legislative discretion."

In *Mahady v. The Bushwick Railroad Co.,* 91 N. Y., 148, 153, Andrews, C. J., said with reference to the effect of the *Story* case:

"The plaintiff, though an abutting owner "simply, the fee of the street being in the "city, was entitled to the use of the street, "and neither the Legislature nor the city "could devote it to purposes inconsistent "with street uses, without compensation, ac- "cording to the principle of Story *v.* The "Elevated Railroad Co., 90 N. Y., 122."

In the *Lahr* case (104 N. Y., 268, 288) Ruger, J., declared that the appropriation of a public street for an elevated railroad "is a use which neither the city authorities nor the Legislature

can legalize or sanction without providing compensation for the injury inflicted upon the property of abutting owners."

As to the power of the Legislature over city streets and their regulation for street use, RUGER, C. J., decided in the *Lahr* case, 104 N. Y., 268, 292:

> "The logical effect of the decision in the "*Story* case is to so construe the Constitution "as to operate as a restriction upon the legis- "lative power over the public streets open- "ed under the Act of 1813, and confine its "exercise to such legislation as shall author- "ize their use for street purposes alone. "Whenever any other use is attempted to be "authorized, it exceeds its constitutional "authority. Statutes relating to public "streets which attempt to authorize their "use for additional street uses, are obviously "within the power of the legislature to enact, "but questions arising under such legislation "are inapplicable to the questions here in- "volved."

With reference to the legislative power to authorize the construction of an elevated railroad in the city street, Ruger, C. J., further declared in the *Lahr case,* 104 N. Y., 268-295:

> "The Legislature, as we have seen, had not "power to authorize the street to be used for "an elevated steam railroad, and that want "of authority extends to every incident nec- "essary to make the road an operative ele- "vated steam railroad, which occasions in- "jury to the rights of abutters on the "street."

In the *Kane* case, speaking of the power of the

Legislature over the city streets, and of the limitation upon that power, Andrews, C. J., said (125 N. Y., 183):

> "We have, then, an express and deliber-
> "ate legislative declaration of a trust in re-
> "spect to all the streets owned by the city,
> "however or whenever acquired, that they
> "shall forever be kept open as public streets,
> "upon faith of which owners of abutting
> "property have, or are presumed to have,
> "acted in improving and building thereon.
> "Can the Legislature abrogate this trust, or
> "authorize its violation without making
> "compensation for any injury sustained by
> "abutting owners? Justice requires a nega-
> "tive answer, and we think it may be proper-
> "ly said that the acceptance and acting upon
> "this trust by owners of abutting property
> "creates in them a right which the law will
> "enforce to have and enjoy the advantages
> "and incidents of a public street, in connec-
> "tion with their property, of which the Leg-
> "islature cannot deprive them without com-
> "pensation."

In the *Fobes* case, 121 N. Y., 505, 518, Peckham, J., referring to the facts, declares in the *Story* case as saying:

> "A plain, palpable and permanent misap-
> "propriation of the street or some portion of
> "it to the exclusive use of the defendant cor-
> "poration, and as resulting from it, the
> "Court held that there was a taking of prop-
> "erty belonging to the plaintiff without com-
> "pensation, which no Legislature could au-
> "thorize or legalize."

In the *Reining* case (128 N. Y., 157, 167), Andrews, J., declared that:

> "The Legislature cannot legally authorize

"structures for railroad purposes to be "erected therein for the use and convenience "of railroads, which practically exclude the "abutting owners from the part of the street "so occupied without compensating them for "the injury suffered."

In Abendroth v. *Manhattan Ry. Co.* (122 N. Y., 1) the Court said:

"An owner of a lot adjoining a city street, "although his title extends only to the side "of the street, and he has no ownership of "the land or interest therein, save as abut- "ting owner, has incorporeal private rights "therein, which are incident to his property, "and which may be so impaired as to entitle "him to damages. Such rights are private "property within the provisions of the State "Constitution (Art. 1, § 6) which forbid the "taking of private property for public use, "without just compensation."

In *Kane* v. *N. Y. Elevated R. R. Co.* (125 N. Y., 165), the Court said:

"The owners of lots abutting on a city "street, the fee of which is in the municipal- "ity, have, by virtue of proximity, special "and peculiar rights, facilities and privi- "leges therein in the nature of easements, "which are not common to the citizens, and "constitute property of which they cannot be "deprived by the Legislature or the munici- "pality, or both, without compensation; and "any use of such street inconsistent with its "use as a public street which interferes with "these easements, is a taking of property, "for which said owners are entitled to com- "pensation to the extent of the damages oc- "casioned thereby."

In *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 N. Y.,

115), the above decisions were approved and applied to a case where under an Act of the Legislature a street in Rochester had been partially closed for the purpose of elevating railroad tracks and the railroad company previous to the time of discontinuing the street had acquired the fee of the same for railroad purposes subject to its use by the general public.

NINTH POINT.

The only pretended justification for the appropriation of plaintiff's easements is the New York Act of 1892.

We are thus brought to the conclusion as stated in the above heading, that the only possible pretense of justification for the taking of the plaintiff's easements, is to be found in the Act of 1892. We have seen how these easements were created; we have seen that they existed and had been enjoyed by her and her predecessors in title for over half a century prior to 1893; and we have seen that a private corporation could not have appropriated them without compensation. The defendants, however, claim that they were justified in this appropriation by Chapter 339 of the Laws of 1892, which they set up in their answer. There is nothing else left of the defense. The condemnation proceedings against the infant Benson, by which defendants acquired the twenty-four foot strip are of no consequence in the case as presented, be-

cause they were allowed by the decision of the trial Court the use of this strip to the fullest extent claimed by them. Neither can they plead the *erection* of the viaduct by the State as a partial defense because there has been no recovery in this case for that erection, nor even for the operation of it, as long as the State assumed any control whatever, namely, for the three years during which the erection was progressing from 1894 to 1897. For the trespasses which the defendants are daily committing upon plaintiff's property their only shield is the State Statute of 1892.

TENTH POINT.

The authority exercised by the Court of Appeals under Chapter 339 of the New York Laws of 1892 to deprive plaintiff of her property without compensation, was repugnant to the Constitution of the United States.

It is not necessary in this case for this Court to decide the question whether the Act of 1892 was or was not unconstitutional. That Act nowhere states that the railroad companies shall be free from the obligation of paying for the easements they have appropriated, and this is pointed out in the Fries case by the able dissenting opinion of Judge Cullen. This writ of error is granted under the Act of Congress which provides for a review, where either the statute *or the authority* exercised thereunder is repugnant to the Constitu-

tion of the United States. And the record in the Court of Appeals shows that that was the question raised before it, for it reads: "That in the said "suit or action there was drawn in question the "validity of Chapter 339 of the laws of 1892 and "the acts amendatory thereof *and of the authority "exercised thereunder* on the ground of their be- "ing repugnant to the Constitution of the United "States."

The statute provided for the erection of an elevated railroad. The Supreme Court of the State of New York held that plaintiff was entitled to compensation for the property taken in the construction of the road. The Court of Appeals held otherwise, and that because the State had commanded the erection, plaintiff was not entitled to such compensation. It is this *decision of the Court of Appeals* that we seek to have reversed. It is that *authority exercised under that Act* that we seek to have overruled in this case.

This authority was exercised in a manner violative or repugnant to the Constitution, because it took plaintiff's property without the opportunity for a hearing or any pretense of such an opportunity.

Notice of hearing or an opportunity to be heard are necessary elements of due process of law.

Roller v. Holly, 176 U. S., 398, 409.
Carson v. Brockton Sewerage S., 182 U. S., 398, 401.

Due process of law also included provision for compensation for property taken.

Chicago, Etc., R. Co. v. Chicago, 166 U. S., 226, 236, 241.

Tindal v. Wesley, 167 U. S., 204, 222, 223.

Holden v. Hardy, 169 U. S., 366, 390-1.

Norwood v. Baker, 172 U. S., 269, 277.

Further, it is to be said that the prohibition in the Fourteenth Amendment applies to all instrumentalities of the State, its legislative, executive and judicial authorities.

Chicago, Etc., R. C. v. Chicago, 166 U. S., 226, 233, 234.

Scott v. McNeal, 154 U. S., 34, 35.

The legislature has no power to abrogate the trust created by the dedication of land for public purposes except upon making compensation.

Railroad Co. v. Schurmeir, 7 Wall (U. S.), 272, 289, 290.

U. S. v. Ill. Central R. Co., 2 Biss. (U. S.), 174, 181.

Packet Co. v. Sorrels, 50 Ark., 466, 473.

Canastota Knife Co. v. Newington Tramway Co., 69 Conn., 146, 172.

City of Jacksonville v. Jacksonville R. Co., 67 Ill., 540, 543.

City of Chicago v. Ward, 169 Ill., 392, 412.

Warren v. The Mayor, 22 Iowa, 351, 356.

Franklin Co. v. Lathrop, 9 Kan., 453, 463.

Schurmeir v. St. Paul R. Co., 10 Minn., 82, 105. Affd. 7 Wall (U. S.), 272.

City of St. Paul v. Chicago R. Co., 63 Minn., 330, 352.

Belcher Sugar Ref. Co. v. St. Louis Co., 82 Mo., 121, 125-6.

Cummings v. St. Louis, 90 Mo., 259, 263-4.

City v. Laverack, 34 N. J. L., 201.

Trustees v. Mayor, 19 N. J. Eq., 355, 357.

Methodist Episcopal Church v. Penn. R. Co., 48 N. J. Eq., 452.

LeClercq v. Gallipolis, 7 Ohio, 217.

Board of Education v. Edson, 18 Ohio St., 221, 225.

Portland R. Co. v. City of Portland, 14 Oregon, 188, 197.

Lamar Co. v. Clements, 49 Texas, 348.

Penn. v. Wheeling Bridge Co., 13 How. (U. S.), 518.

Bridge Proprietors v. Hoboken Co., 1 Wall (U. S.), 116, 144-5.

The Binghamton Bridge, 3 Wall (U. S.), 51.

Finally, the proposition at the head of this point has been finally and conclusively decided as there stated by this Court in the Muhlker case (April 10, 1905).

ELEVENTH POINT.

The constitutional provisions for the protection of property and contracts should be liberally and faithfully enforced.

This is a flagrant instance of a violation of property and contract rights. The defendants, under pretended color of authority by the legislature, entered on a public street and appropriated and destroyed valuable property belonging to scores of private individuals, bringing them in many cases to the verge of ruin. The facts were notorious, and were, moreover, proven convincingly in the Courts and before judges having full knowledge of the local situation. A dozen different Supreme Court Justices of the highest character and familiar with the locality, found the facts as the property owners claimed, and gave solemn judgment that they had actually suffered the grievances they complained of, and were entitled to redress in damages. The State Court of Appeals, following a line of unbroken decisions, affirmed the principle and the judgment in the first case before it. And then, at last, the same Court of Appeals, by a bare majority vote, reversing itself, tells the injured property owners and contract owners, that they have no right to demand any redress or compensation whatever; that the State law has abrogated the contract on which they relied, and has decreed that property which they and their predecessors have possessed for half a century shall be taken from them without compensation. Now when they come here, they are told by the defendants' learned

counsel that as the State Court must be supposed to have decided justly, therefore the presumption is conclusive that these plaintiffs never had any property or contract rights of which they could be deprived. In the State Courts plaintiffs are told, yes, the defendants have taken your property, but they did it by command of the State, and you have no redress; and when they appeal to this Court and ask if that is really the law, then they are told by the same defendants at this Bar that they never had any easements and were never deprived of any, and when, in reply, they turn to the record and the findings of the Court, showing that they actually had this property, and that they lost it, and what damages they have sustained, and what the evidence shows, and what the State Courts themselves found and decided to be the fact, they are answered that this Court must not examine the findings, but must assume that the New York Court of Appeals did exactly the contrary of what it actually did, and what it said it did, and what it openly claimed it did when it decided these cases. Justice would indeed be blind if such a plea could be successful.

If whenever the action of the State authorities is brought here for review upon a claim that they have taken property without compensation, it is to be a sufficient answer that there is a conclusive presumption of law that the State authorities did right, and that there was in fact no property to be paid for notwithstanding the facts and notwithstanding the findings of the State Courts themselves, then the right of review in such cases and the constitutional safeguard are practically valueless.

The true rule requires and plain justice re-

quires this court to look into the record and see what the facts are as found by the court below and as they appear uncontradicted upon the record and acting upon those facts, to give contracts and property rights the protection which the Constitution guarantees.

In *Murray* v. *Charleston*, 96 U. S., 432, 448, it was said: "There is no more important provision "in the federal constitution than the one which "prohibits States from passing laws impairing "the obligation of contracts, and it is one of the "highest duties of this Court to take care that "the prohibition shall neither be evaded nor frit-"tered away. Complete effect must be given to it "in all its spirit. The inviolability of contracts, "and the duty of performing them as made, are "foundations of all well ordered society and to "prevent the removal or disturbance of these "foundations, are one of the great objects for "which the Constitution was framed."

TWELFTH POINT.

The judgment entered upon the decision of the New York Court of Appeals should be reversed.

ALFRED B. CRUIKSHANK,
Of Counsel for plaintiff in error.

FILED
APR 25 1
JAMES H. McKENN

IN THE

Supreme Court of the United States.

ALICE I. BIRRELL, *Plaintiff in Error,* *against* THE NEW YORK & HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendants in Error.*	October Term, 1904. No. 202.
PATRICK KIERNS, *Plaintiff in Error,* *against* THE NEW YORK & HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendants in Error.*	October Term, 1904. No. 203.

STATUTES AND DECISIONS SUPPLEMENTAL TO BRIEF OF PLAINTIFFS IN ERROR.

ALFRED B. CRUIKSHANK,
of Counsel for Plaintiffs in Error

ATWATER & CRUIKSHANK,
Attorneys for Plaintiffs in Error.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.

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The Act of 1807 under which the City streets were laid out.

Laws of 1807, of State of New York.

Material Parts of Chapter 115.

AN ACT relative to improvements, touching the laying out of streets and roads in the City of New York, and for other purposes:

Be it enacted by the people of the State of New York, represented in senate and assembly, that Gouverneur Morris, Simeon DeWitt and John Rutherford be, and they are hereby appointed Commissioners of Streets and Roads in the City of New York, for the purpose of performing the several acts and duties hereinafter prescribed.

And be it further enacted, that it shall and may be lawful to and for the said commissioners, or any two of them, and they shall have and possess exclusive power to lay out streets, roads and public squares of such width, extent and direction as to them shall seem most conducive to public good, and to shut up or direct to be shut up any streets or parts thereof which have been heretofore laid out, and not accepted by the common council of the said city, within that part of the said city of New York to the northward of a line commencing at the wharf of George Clinton, on Hudson river; thence running through Fitzroy road, Greenwich lane and Art street, to the Bowery road; thence down the Bowery road to North street; thence through North street, in its present direction, to the East River; and no square or plot of ground, made by the intersection of any streets to be laid out by the said commissioners shall ever after the streets around the same shall be opened, be or remain divided by any public or open lane, alley, street or thoroughfare; and it shall be the duty of the said commissioners to lay out the leading streets and great avenues, by them to be laid

out, of a width not less than sixty feet, and in general to lay out said streets, roads and public squares of such ample width as they may deem sufficient to secure a free and abundant circulation of air among said streets and public squares when the same shall be built upon; and said commissioners shall not, in any case, lay out any streets of less than fifty feet in width.

And be it further enacted, That it shall and may be lawful to and for the said commissioners, and for all persons acting under their authority, to enter, in the daytime, into and upon any lands, tenements or hereditaments which they shall deem necessary to be surveyed, used or converted for the laying out, opening and forming of any street or road as aforesaid; and that the said commissioners, or any two of them, shall cause three similar maps of such streets and roads, so to be laid out by them as aforesaid, and of the shores bounding the land by them surveyed, to be made upon an extensive scale, accompanied with such field notes and elucidatory remarks as the nature of the subject may require; which maps, accompanied by such field notes and remarks, shall be attested to by the said commissioners, or any two of them, before any person authorized to take acknowledgments of deeds and conveyances, and be filed one in the office of the secretary of state, to remain of record, one other to be filed in the office of the clerk of the city and county of New York, to remain of record, and the other of said maps to belong to the mayor, aldermen and commonalty of the city of New York; and that the said commissioners shall erect suitable and durable monuments at the most conspicuous angles or those which shall be the most eligible for that purpose, and upon the shores of the North and East rivers, to be noted on said maps and that the said commissioners shall take the elevations of the several intersections or squares above high-water mark within the boundaries aforesaid, or so many of them as they may think sufficient, and shall delineate them, together with all such hills, vallies, inlets and streams as may be necessary on the said maps, so as to render the same explicit and intelligible. * * *

And be it further enacted, That the plans and surveys of the said commissioners, or any two of them in respect to the laying out of streets, and roads, within the boundaries aforesaid, and the maps of the same, so as to be made by them or any two of them, as aforesaid, shall be final and conclusive, as well in respect to the said mayor, aldermen and commonalty as in respect to the owners and occupants of lands, tenements and hereditaments within the boundaries aforesaid, and in respect to all other persons whomsoever.

Then follows a provision for agreement as to price, and in default thereof, of appraisement by commissioners in the ordinary form and assessments upon the property benefited.

And upon such assessment being completed, said mayor, aldermen and commonalty of the city of New York shall be and become seized in fee of all such lands, tenements and hereditaments, and thereupon the said mayor, aldermen and commonalty of the city of New York, or any person acting under their authority, may immediately take possession of the same without any suit or proceeding at law for that purpose, *in trust nevertheless, that the same be kept open for a public street, road, or public square forever.*

And be it further enacted that this Act shall be considered adjudged and taken to be a public act and be liberally expounded and construed to advance the ends thereof.

Act of 1813 providing for street openings.

Material Parts of Chapter LXXVI of the Revised Laws of the State of New York.

AN ACT to reduce several laws relating particularly to the City of New York into one act, passed April 9, 1813.

CLXXVII. Opening and laying out streets, &c.

And be it further enacted that whenever and as often as the mayor, aldermen and commonalty of the City of New York shall be desirous to open any street, avenue, square, or public place, or any particular part or section of any street or avenue laid out by the commissioners of streets and roads in the City of New York, under and by virtue of the act, entitled "An act relative to improvements touching the laying out of streets and roads in the City of New York, and for other purposes," passed April 3, 1807, and also whenever and as often as so many proprietors of lands fronting on any such street, avenue, square or public place, or any particular part or section of any such street, avenue, square or public place as shall together own three-fourths parts of all the lands fronting on such street, avenue, square or public place, or on such part or section of any such street, avenue, square or public place, shall by petition, desire the said mayor, aldermen and commonalty to open any such street, avenue, square or public place, or any such particular part or section of any such street, avenue, square or public place, and the said mayor, aldermen and commonalty shall deem the opening thereof to be necessary or useful, it shall be lawful for the said mayor, aldermen and commonalty to cause the same to be opened, and the lands, tenements and hereditaments that may be required for the purpose of opening the same, may be taken for that purpose, and compensation and recompence made to the parties and persons, if any such there

shall be to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the damage over and above the value of the said benefit, in the manner hereinafter for that purpose directed and prescribed; and whenever and as often also as it shall in the opinion of the said mayor, aldermen and commonalty, in common council convened, be necessary or desirable for the public convenience or health to lay out, form and open any street, or streets, or public place or places, in any part of said city, not laid out into streets, avenues, squares and public places by the commissioners of streets and roads in the City of New York, under and by virtue of the act aforesaid, or to extend, enlarge, straighten, alter or otherwise improve any street or streets or part of a street, or public place or places, already laid out or hereafter to be laid out, and formed or opened in any part of said city not laid out into streets, avenues, squares and public places by the commissioners aforesaid, it shall be lawful for the said mayor, aldermen and commonalty of the City of New York, to order and direct the same to be done, and to cause the same to be done accordingly in such manner as they shall think most advisable, notwithstanding it may become necessary for that purpose to remove any building or buildings, or to take any lands, tenements, hereditaments or premises whatsoever; and if the said mayor, aldermen and commonalty shall require any lands, tenements, hereditaments or premises of any person or persons, or body politic or corporate, for any such purpose the same may be taken and appropriated to such use, and compensation and recompense made to the parties and persons respectively, if any such there shall be, to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the said damage above the said benefit, in the manner for that purpose hereinafter mentioned and provided.

CLXXVIII: Be it further enacted, that whenever and as often as any lands, tenements, hereditaments or premises whatsoever shall be required for the said purposes of

opening any such public square, place, street or avenue, etc.

Here follows detailed provisions for the appointment of commissioners to ascertain the damages; their duties and manner of ascertainment, report to the Supreme Court of all proceedings and confirmation thereof.

Said report so confirmed to be final and conclusive upon all the parties and upon all other persons whomsoever, and on such final confirmation of such report by the said court, the said mayor, aldermen and commonalty of the City of New York, shall become and be seized in fee of all the said lands, tenements, hereditaments and premises in the said report mentioned, that shall or may be so required for the purpose of opening the said public square or place, street or avenue, or part or section of a street or avenue so to be opened, or for the purpose of laying out and forming the said street or public place so to be laid out and formed, or for the purpose of extending, enlarging or otherwise improving the street or public place so to be extended, enlarged or otherwise improved, as the case may be, the same to be appropriated, converted and used to and for such said purpose accordingly; and thereupon the said mayor, aldermen and commonalty, or any person or persons acting under their authority, may immediately, or at any time or times thereafter, take possession of the same, or any part or parts thereof, without any suit or proceedings at law for that purpose: *In trust, nevertheless, that the same be appropriated and kept open for, or as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city, are, and of right ought to be.*

Sec. CLXXV provides that *all moneys expended by the corporation for said purposes shall be assessed upon the persons benefited* by the said public square or place, street or avenue or part thereof.

Charter of the N. Y. & Harlem R. R. Co.

CHAP. 263, LAWS 1831.

AN ACT to incorporate the New York and Harlaem Rail-Road Company. Passed April 25, 1831.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Sec. 1. Benjamin Bailey, Mordicai M. Noah, Benson McGown, James B. Murray, Charles Henry Hall, Moses Henriques, Isaac Adriance, Thomas Addis Emmet, Gideon Lee, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen and Robert Stewart, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the New-York and Harlaem Rail-Road Company, with power to construct a single or double rail-road or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One hundred and twenty-fourth street and the north bounds of One hundred and twenty-ninth street, to transport, take and carry property and persons upon the same, *by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the said company may choose to employ;* and by that name, they and their successors shall be and they are hereby vested with the right and privilege of constructing, erecting, building, making and using a single or double rail-road or way *for the purpose aforesaid, and for the term of thirty years from the passage of this act.*

Sec. 2 If the corporation hereby created shall not within six months from the passage of this act locate the route of said rail-road or way and the branch to the same, and make a survey of such location, and file a map thereof in the register's office of the city and county

of New York, and within two years from the passage of this act commence, and within four years from the passage of this act construct, finish, and put in operation the said single or double rail-road or ways, then the said corporation shall thenceforth forever cease, and this act shall be null and void; *but no such map shall be filed until the same shall have been submitted to and approved by the common council of the city of New York;* such approbation shall be expressed by a joint resolution of the said common council, declaring their approbation of the map, and of the route of the said rail-road indicated therein.

SEC. 3. The capital stock of the said company shall be three hundred and fifty thousand dollars, and the stock shall be divided into shares of fifty dollars each, and shall be deemed personal property, transferrable in such manner as the by-laws of said corporation shall direct.

SEC. 4. Isaac Adriance, Mordecai M. Noah, Benjamin Bailey, Moses Henriques, Thomas Addis Emmet, Benson McGown, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen, and Robert Stuart, shall be commissioners, the duty of whom it shall be on or before the first Monday of June next after the passing of this act at some suitable place in the city of New-York, to open books to receive subscriptions to the capital stock of the said corporation, and twenty days' public notice shall be given by the said commissioners of the time and place of opening such books, in one of the public newspapers of the said city; and said books shall be kept open for three days from ten to two o'clock of each day, and within ten days after said stock shall be subscribed, to give a like notice for a meeting of the stockholders, at such time and place as the said commissioners shall appoint, to choose thirteen directors, and such election shall be then and there made by such of the stokholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the stockholder to one vote; and the said commissioners shall be inspectors of the first election of directors of the said corporation, and shall certify, under their hands, the names of those duly

elected, and deliver over the subscription books to the said board of directors; and the time and place of holding the first meeting of the first directors shall be fixed by the said commissioners, and the said board of directors shall have power to appoint an engineer, and cause such examinations and surveys for the said rail-road to be made as may be necessary to the selection by them of the most advantageous line, course or way for the said way; and the said board of directors shall, after such examinations and surveys shall be made, select and under their hands and seals, designate the line, course or way, which they may deem most advantageous for the said rail-road, one of which certificates shall be filed in the office of the register of the city and county of New-York; which line, course or way, so selected and certified, shall be deemed the line, course or way on which the said corporation shall construct, erect, build or make their single or double rail-road or ways as hereinafter mentioned; the expenses of all which surveys and examinations, and all manner of incidental expenses relating thereto, shall be paid for by the said corporation.

Sec. 5. The commissioners shall proceed to distribute the capital stock of the said corporation among the subscribers thereto; and in case there should be subscriptions to more than the amount of such stock, within the time above prescribed, it shall be the duty of said commissioners to apportion the same among the subscribers thereto, in such manner as they shall deem most advantageous to the interests of the institution; but no person who shall have subscribed for twenty shares or upwards, shall, upon such distribution, receive less than twenty shares, unless the subscriptions for the said last mentioned or a less number of shares, shall exceed the whole amount of the capital stock; nor shall there be allowed to any one of the commissioners or subscribers, directly or indirectly, or to any one in trust, for him, more than two hundred shares of said stock, if, without such allowance, the whole of the stock be taken up; and if, at the expiration of the third day on which the subscription books shall have been kept open, the whole

amount of the capital stock shall not have been subscribed, then the commissioners may subscribe for the remaining shares.

SEC. 6. The said board of directors to be chosen at such meeting, or at such annual election, shall, as soon as may be after every election, choose out of their own number one president, and one other person to be vice-president; and in case of the death, resignation or absence of the president, the vice-president shall preside until the annual election thereafter, or until he shall return, or another president shall be chosen; and in case of the death or resignation of the president or vice-president, or of any director, such vacancy or vacancies may be filled for the remainder of the year, wherein they may happen, by the board of directors; and in case of the absence of the president and vice-president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide.

SEC. 7. In case it should at any time happen that an election of directors shall not be made on any day when pursuant to this act it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time directed by the by-laws of the said corporation, within sixty days after the day on which it should have been held.

SEC. 8. The said corporation are hereby authorized, by their agents, surveyor, and engineers, to enter upon such route, place or places, to be designated as aforesaid by the said directors, as the line, course, road and way whereon to construct their single or double rail-road or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall be made to the said corporation, to aid in the construction,

maintenance and accommodation of the said single or double rail-road, or ways, provided that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation, of the owner or owners of the same, at a price to be mutually agreed upon between them; and in case of a disagreement of price, and before the making of any portion of the road upon said land, the said corporation or the owner of such land may apply by petition to the vice-chancellor of the first circuit, who upon such application shall cause such notice to be given to the other party as he shall deem proper and sufficient, appointing therein the time and place of hearing the parties, at which time and place, upon proof that the notice directed has been given, the said vice-chancellor shall direct the manner of ascertaining the damages which the owner of such land or real estate will sustain by the occupation thereof by the said corporation; and the said vice-chancellor shall appoint three competent and disinterested commissioners, who shall be freeholders and residents of the city of New-York, and who shall, under the direction of the said vice-chancellor, make appraisements and determine said damages and report in writing under their hands to the said vice-chancellor, who shall examine the same and hear the parties in relation thereto if he shall deem it expedient, and increase or diminish the damages if he shall be satisfied injustice has been done. The report shall contain a minute and accurate description of the land appraised. The commissioners shall be allowed three dollars each a day for their services. Upon proof to the said vice-chancellor, to be made within thirty days after his determination of payment to the owner or of the depositing to the credit of the owner in such incorporated moneyed institution, as the said vice-chancellor shall direct, of the amount of said damages and the payment of all expenses, the said vice-chancellor shall make an order or decree, particularly describing the land and reciting the appraisement of damages and the mode of making it, and all other facts necessary to a compliance with this section of this act;

and when the said order or decree shall be recorded in the office of the register of the city and county of New-York, the said corporation shall be seized and possessed of the fee simple of all such lands or real estate, and may enter upon, take and use the same for the purposes of the said road.

SEC. 9. In case any married woman, infant, idiot or insane person or non-resident of the state, who shall not appear after such notice, shall be interested in any such land or real estate, the said vice-chancellor shall appoint some competent disinterested person to appear before the said commissioners and act for and in behalf of such married woman, infant, idiot, insane person or non-resident.

SEC. 10. The said corporation is hereby authorized to construct, erect, build, make and use a single or double rail-road or ways of suitable width and dimensions, to be determined by the said corporation, on the line, course and way, selected or designated by them in manner aforesaid, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and such other buildings for the accommodation of their concerns, as they may deem suitable to their interests: The said corporation shall not take any lands without the consent of the owner or owners thereof, exceeding forty feet in width from east to west, and shall in case of their locating the route of the said rail-road *in or along* any public street or avenue now laid out on the map or plan of the city of New-York, leave sufficient space in the said street or avenue on each side of the said rail-road for a public highway for carriages, and for a sidewalk for foot passengers.

SEC. 11. Whenever it shall be necessary for the construction of their single or double rail-road or way, to intersect or cross any stream of water or water courses, or any road, street or highway, it shall be lawful for the said corporation, with the consent and approbation of the mayor, aldermen and commonalty of the city of New-York, to construct their single or double rail-road or ways

across or upon the same; provided that the corporation shall restore the stream or water course or road, street or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness, and shall, moreover, erect and maintain sufficient fences upon the line of the route of their single or double rail-road or ways.

SEC. 12. It shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of property or persons on the single or double rail-road or ways aforesaid, hereby authorized to be constructed, erected, built, made and used.

SEC. 13. If any person or persons shall wilfully do or cause to be done any act or acts whatever, whereby any building, construction or work of the said corporation, or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, by action of debt.

SEC. 14. Each subscriber shall pay twenty per cent. on the amount subscribed by him, at the time of making such subscription; and it shall be lawful for the directors or a majority of them, to require payment of such other sums of the capital stock at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeitures of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time when the same are to be paid, at least thirty days previous to the payment of the same, in a public newspaper published in the city of New-York.

SEC. 15. The said corporation shall possess the general powers, and be subject to the general restrictions and liabilities prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as are not repealed.

SEC. 16. *Nothing in this act shall be deemed to authorize* the said corporation to construct or use their single or double rail-road or way across or along any of the streets or avenues as designated on the map of the city of New-York, whether such streets or avenues shall have been opened or not, *without the consent of the mayor, aldermen and commonalty of said city,* who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way across or along said streets or avenues, or prohibit them from constructing the same, and after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof; and nothing in this act contained shall prevent the legislature from granting to any other corporation or persons, the right of constructing a rail-road or roads parallel wtih the one herein mentioned, or any part of it, on any lands, street, road or avenue not occupied by the rail-road or way hereby authorized, or the right of crossing or intersecting the same at any point or points, without making compensation for injuries sustained thereby.

SEC. 17. No person who shall at the time be a member of either branch of the common council of the city of New-York, shall act as commissioner or director of said corporation under this act.

SEC. 18. The legislature may at any time alter, amend, modify or repeal this act.

ACT FOR WIDENING FOURTH AVENUE.

CHAP. 274.

AN ACT to alter the map or plan of the city of New York.

Passed April 27, 1837.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. All that part of Forty-First-street lying between the Fifth and Sixth avenues; also all that part of

Sixty-Eight-street lying between the Third and Fourth avenues; also all those parts of Eightieth, Eighty-First, Eighty-Second, Eighty-Third, Eighty-Fourth and Eighty-Fifth-streets lying between the Sixth and Seventh avenues, as the same are laid out and designated on the map or plan of the city of New-York, are hereby discontinued on the said map or plan.

SEC. 2. The Fourth avenue shall be continued and extended on the said map or plan from Sixty-Sixth-street to Sixty-Eight-street. Also Avenue A and the First, Second, Third and Fourth avenues shall be respectively continued and extended on the said map or plan from One Hundred and Sixth-street to One Hundred and Ninth-street. Also One Hundred and Seventh and One Hundred and Eighth-streets shall be respectively continued and extended on the said map or plan from the Fifth avenue to the Harlaem river. And the owner or owners of the lands and tenements which shall be included in any blocks or plots of ground to be formed by such extension and continuation of the said avenues and streets, respectively, shall have, hold, occupy, possess and enjoy the same in like manner as he, she or they would have been entitled to do if the said avenues and streets had been originally so extended and continued on the said map or plan; and whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid, in like manner as the same would have been done if the said avenues and streets had been originally so extended and continued.

SEC. 3. All that part of the *Fourth avenue* in the city of New-York, lying between Thirty-Fourth-street, and the Harlaem river, *shall be widened* on the map or plan of the said city, by adding thereto, on each side thereof, twenty feet of *land, so as to make the whole width of that part of the said avenue one hundred and forty feet.*

SEC. 4. The said part of the Fourth avenue so to be widened is hereby declared to be one of the avenues of the city of New-York in like manner and with the like effect as if the same had been so laid out by the commis-

sioners appointed in and by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the City of New-York, and for other purposes," passed April 3d, 1807.

ACT OF 1872 FOR CHANGES IN GRADE, ADDITIONAL TRACKS, ETC.

CHAP. 702.

AN ACT to improve and regulate the use of the Fourth avenue in the city of New York.

Passed May 14, 1872; three fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company is hereby authorized and required to *regulate the grade* of their railroad in the Fourth avenue of the city of New York, and to construct such viaducts, foot and road bridges over the same, and such excavations and tunnels under the same, with openings for proper ventilation, for the purpose of rendering the same safe and convenient to any persons crossing the same, and the railroad trains and passengers traveling thereon, in the following manner, namely: At Forty-fifth and Forty-eighth streets, to construct tunnels under the said streets and the Fourth avenue for sidewalks and carriage ways underneath the railroad at least thirty-four feet wide, or bridges over the railroad of at least that width, for the same purpose, and at Forty-sixth, Forty-seventh and Forty-ninth streets tunnels under the said streets and the Fourth avenue, or bridges over the same, at least twelve feet in width, for foot passengers. Said tunnels or bridges shall have easy approaches, and the tunnels shall be dry and thoroughly ventilated and lighted. Between Forty-eighth and Forty-ninth streets the grade of the railroad shall commence to descend, and shall descend as rapidly as the operation of the road will permit,

so that at Fifty-sixth street the grade of the railroad shall be thirteen feet six inches below the grade of the avenue; and from thence to Ninety-sixth street the road shall run through a covered way, with openings in the coverings not to exceed one hundred and fifty feet in length, and twenty feet in width in each block; and thence continuing upon the present grade to the center of One Hundred and Fifth street, and thence descending at the rate of about forty feet to the mile to the center of One Hundred and Twentieth street, where the said grade shall be fourteen feet one inch below the grade of the avenue; thence descending at the rate of about twelve feet and four-tenth of a foot to the mile to the center of One Hundred and Twenty-ninth street, where said railroad grade shall be eleven feet below the grade of the avenue; thence ascending at the rate of twenty-six feet and four-tenths of a foot to the mile to the center of One Hundred and Thirty-third street to and upon the present grade of the railroad; the grade of said road at Fifty-ninth street shall not exceed fifteen feet six inches below the grade of the said avenue as established by law. At Seventy-fourth street it shall not exceed thirteen feet six inches, and at Seventy-ninth street shall not exceed twelve feet. At Fiftieth and Fifty-first streets, elevated bridges of iron for foot passengers shall be constructed over the railroad. Between Fifty-second and Fifty-third streets a bridge shall be constructed for foot passengers and carriages over the railroad, with approaches parallel with the railroad, and at Fifty-fourth and Fifty-fifth streets bridges of iron shall be constructed for foot passengers over the railroad; and from Ninety-eighth street to One Hundred and Fifteenth street, the railroad shall be carried upon a viaduct, with stone arches or iron bridges in said viaduct over the cross or intersecting streets above One Hundred and First street, to and include One Hundred and Thirteenth street. Between One Hundred and Seventeenth and One Hundred and Eighteenth streets, a bridge shall be constructed over the railroad with parallel approaches, the same as before provided between Fifty-second and Fifty-third

streets; from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive, iron bridges over the railroad shall be constructed upon the line of each street the full width of the street. At One Hundred and Thirtieth and One Hundred and Thirty-first streets, iron bridges for foot passengers shall be constructed over said railroad; between Forty-fifth and Forty-ninth Streets, including said streets, iron railings or brick walls shall be erected in said street, outside the railroad tracks, so as to prevent crossing at a level with said railroad tracks. A coping and iron railing shall be constructed upon the parapet and retaining walls along the said improvement, wherever the said roadway runs through an open cut, and also around the openings between Fifty-sixth and Ninety-six streets.

SEC. 2. During the progress of the work, the New York and Harlem Railroad Company is hereby authorized to lay down such additional temporary tracks on the Fourth avenue above Forty-second street, as may be necessary for the railroad business during the progress of the work, and such tracks shall be removed when the work shall be completed, *and said company is hereby authorized*, for the purpose of facilitating rapid transit and accommodating local traffic, *to lay down permanently two additional tracks on said avenue* and to make such landings and excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct.

SEC. 3. Whenever it shall be found advisable or necessary to alter the grade of the streets crossing the said avenue or of the said avenue, where the said road shall pass through a covered way, the same may be done by said company, but so as not to interfere with the free use of the streets by the public.

SEC. 4. The sidewalks on Fourth avenue between Forty-ninth and Fifty-sixth streets, and between Ninety-sixth street and the Harlem river, shall not exceed fifteen feet in width.

SEC. 5. Whenever it shall be necessary in the progress

of said work to remove or alter the Croton water pipes, sewers or gas pipes upon said avenue, the same shall be done by the department or corporation having in charge thereof, so as not to interfere with said work.

SEC. 6. There shall be a board of engineers, whose duty it shall be to execute, direct and superintend the construction of the said improvement, to be called the board of engineers of the Fourth avenue improvement. It shall be the duty of the said board to file a monthly statement, under oath, of the items of their expenditure with the comptroller of the city of New York. Regular accounts of all their transactions shall be kept by the board, which shall be open to the inspection of the officers of the said Railroad Company and to the Comptroller of the City of New York. The said board are authorized to pass suitable by-laws for their own regulation and government, and to select a presiding officer and secretary from their own number. They shall keep a record of all their proceedings. The said board shall consist of four members, as follows, namely: Allan Campbell and Alfred W. Craven, or their successors, and the chief engineer of the board of public works of the city of New York for the time being, and the engineer of the New York and Harlem Railroad company. In case of the death, removal or resignation of the said Campbell or Craven, or their or either of their successors, the vacancy shall be filled by the remaining members of the board. The said board are hereby authorized and directed to take the entire charge and control of the said improvement, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. The said engineers shall receive eight dollars each for every day that they shall be employed in the performance of their duties under this act. They may appoint one of their number as a general superintendent of the work. The said board shall prepare plans and specifications of said improvement in conformity with this act, and an estimate of the expense thereof, and file a copy of such plans, specifications and estimate in the office of the comptroller of the city of New York. The members of the said board,

before entering upon the performance of their duties shall severally take and subscribe an oath or affirmation before some judge of a court of record in the city of New York, faithfully to perform the trust and duty required of them by this act and as a member of the said board of engineers, which shall be verified by such judge and filed in the office of the said comptroller.

SEC. 7. When the said plan, specifications and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York in equal proportion as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work upon the said improvement that the sum of twenty-five thousand dollars has been expended thereon by the New York and Harlem Railroad Company, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement to be borne and paid by the said city as aforesaid.

SEC. 8. For the purpose of raising the sum or amount of one-half of the estimated expense and cost of the said improvement, to be borne and paid by the city and county of New York, one-half of the proportion or amount to be borne and paid as aforesaid, or one-fourth of the whole estimated expense and cost, shall be raised by a tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the year eighteen hundred and seventy-two, and the remaining sum or one-half of the proportionate amount to be borne and paid by the said city and county shall be raised in like manner and included in

the tax levy for the year eighteen hundred and seventy-three. The comptroller of the city of New York is hereby authorized and directed to issue revenue bonds of the said city, in anticipation of the amount to be raised by taxation for the expense and cost of the said improvement in each year, to provide the means for paying the said proportion of the said city toward the said expense and cost, before the said tax shall be collected, not to exceed the due proportion to be borne and paid by the said city in each of the said years eighteen hundred and seventy-two and eighteen hundred and seventy-three; such bonds to be issued and sold at not less than par. So much of the proceeds of the said tax for each of the said years as may be necessary for the purpose shall be applied to the payment of the revenue bonds to be issued as aforesaid. It is hereby intended and declared that the payments by the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement.

SEC. 9. The mayor, aldermen and commonalty of the city of New York are forbidden to obstruct the said improvement or the use of the Fourth avenue for that purpose above Forty-second street; and the said municipal corporation is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said tunnel and railways shall be exclusively for the uses and purposes of said railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty, as such, with his agents, and assistants, to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose, without the consent of said corporation, under penalty of fifty dollars for each offense, to be recovered by this corporation.

SEC. 10. The said board of engineers shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed the said

railroad company are authorized and directed to run by steam their trains (and such trains of other railroads as shall have obtained the consent of the New York and Harlem Railroad Company) over the said improvement and the route of the said railroad, and in and upon their depot at Forty-second street, and the switches, turnouts and sidings, now authorized by law north of said street.

SEC. 11. The Legislature may at any time alter, amend, or repeal this act.

SEC. 12. This act shall take effect immediately.

EXTRACT FROM RIVER AND HARBOR ACT OF 1890.

(U. S. Stats. At Large, Vol. 26, p. 437.)

"And the Secretary of War is directed to cause the low bridges now crossing said Harlem River to be replaced by other bridges at the expense of the owners thereof as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges, thus required, to be made, the owners of said bridges being allowed a reasonable time in which to complete the work necessary for said approaches. Said bridges shall leave a clear space, between the under sides thereof and the high water of spring tides, of twenty-four feet, and shall be provided with draw-spans and draws of the width and length to be determined by the Secretary of War, and shall in all respects comply with this law and conform to the requirements of the Secretary of War: *Provided*, that the Secretary of War shall prescribe the times and regulations for the opening and operation of the draws in said bridges, but said draws shall not be opened except for vessels propelled by steam with or without vessels in tow; nor shall they be required to be opened at any times other than between ten o'clock in the forenoon and five o'clock in the afternoon."

ACT OF 1892 UNDER WHICH THE VIADUCT STRUCTURE WAS ERECTED.

CHAP. 339.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

Approved by the Governor April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly at the rate of twenty-nine and six-tenths feet per mile to a point at about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be

level at an elevation of twenty-six feet above high-water line of spring tides, to a point at about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

SEC. 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section by raising its parapet walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and the roadbed shall be carried on *a viaduct structure* of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same of timber piling, or concrete, as may be found necessary.

SEC. 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry one Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred

and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park Avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One

Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

SEC. 6. The railroad tracks shall be carried on a solid tight floor, and the drainage water shall be conducted by pipes into the sewers.

SEC. 7. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, is hereby authorized and permitted, at its election, to erect station-houses on both sides of the railroad at One Hundred and Twenty-fifth street, with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-sixth street; and for the support of the girders to sustain such stations and platforms, columns may be erected along the curb lines of Park avenue, between One Hundred and Twenty-fourth and One hundred and Twenty-Sixth streets, and on the curb lines of One Hundred and Twenty-fifth street east and west of Park avenue as may be necessary, the said station columns not to exceed fifteen inches square in size above the surface of the pavement. The said stations and platforms shall be reached by stairs not less than five feet in width, which shall terminate on the side-walk pavement on both sides of One Hundred and Twenty-fifth street, east and west of Park avenue, and also upon the pavement on both sides of Park avenue adjacent to the north line of One Hundred and Twenty-fourth street and the south line of One Hundred and Twenty-sixth street. The station-houses may be built over the roadway of One Hundred and Twenty-fifth street, and may be of a length equal to the distance between the curb lines of the same.

SEC. 8. The Harlem river shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of twenty-four feet above high water of spring tides, and shall provide passageway for vessels on both sides of the centre pier, each of one hundred feet in width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

SEC. 9. From the north abutment of the Harlem river bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eight street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eight street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

SEC. 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eight street, the grade level of One Hundred and Thirty-eight street as now established, shall be altered and be depressed

under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eight street between Mott avenue and railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

SEC. 11. North of the north abutment of One Hundred and Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

SEC. 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, however, shall be done under the approval, direction and sanction of the board hereinafter appointed.

SEC. 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be

called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of

public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

SEC. 14. When the said plan, specification and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad com-

pany for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company.

SEC. 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller when authorized by the board of estimate and apportionment at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

SEC. 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discreet and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties hereinafter mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined

by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or assessment. In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the

said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

SEC. 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

SEC. 18. In each and every case of the appointment of commissioners under this act, it shall be competent

and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

SEC. 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and

proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he. she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or asments with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners without joining any other or others of them, the said parties or owners.

Sec. 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineten of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year,

by tax upon real and personal property subject to taxation in the city and County of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

SEC. 21. The new bridge over the Harlem river, authorized to be constructed, by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the Comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of congress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

SEC. 22. All changes is the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the leg-

islature, are hereby changed to conform to the provisions of this act.

SEC. 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the state of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One Hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the state of New York, is hereby removed and annulled, anything in any act of the legislature of the state of New York, or in any contract made pursuant to any act of the said legislature of the state of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

SEC. 24. The mayor aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents, or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense, to be recovered by said railroad corporation.

SEC. 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad corporations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred and Sixth street to the Harlem river, or the point at which the new bridge over

the Harlem river authorized by this act to be constructed, shall commence.

SEC. 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvements and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

SEC. 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

SEC. 28. This act shall take effect immediately.

OPINION OF N. Y. COURT OF APPEALS IN THE CONABEER CASE, 1898.

This decision has little bearing on the case. The Act of 1892 is not involved or discussed, because the action was brought in 1891 before that Act was passed. It was decided in favor of defendant on the ground that plaintiff's predecessors in title had expressly consented to the construction and operation of the railroad.

Court of Appeals.

HANNAH CONABEER, *Appellant*,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and The New York and Harlem Railroad Company, Respondents.
} 156 N. Y., 474.

Argued June, 1898; decided October, 1898.

Appeal from a judgment of the late General
(476) Term of the Supreme Court in the first judicial department, entered January 26, 1895, affirming a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on the merits on trial at Special Term.

This action was commenced on the twentieth of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof.

In 1807, by chapter 115, of the laws of that year, three commissioners were appointed who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April first, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of

the width of sixty feet, and Fourth avenue of the width of one hundred feet. That act also provided that the map, plans and surveys so made and filed should be final and conclusive as to the mayor, aldermen and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map these streets remained unopened and had no existence, except that which resulted from their being designated as such on the map.

In 1831, by a special act of the legislature (Ch.
(477) 263), the New New York and Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets

thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city.

The provisions of this act were complied with by the New York and Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its
(478) road over Fourth avenue. It obtained the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor, December 22, 1831.

At that time the locality which included the premises in question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the eighteenth of January, 1832, Mrs. McGown conveyed to the New York and Harlem Railroad Company and its successors a portion of the land owned by her, consisting of twenty-four feet of land running through the center of Fourth avenue between Ninety-seventh and One Hundredth and Sixth streets for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much farther beyond the line of the premises granted as might be necessary to support its work, not, however, to extend beyond the width of the avenue, which was one hundred feet.

Some time anterior to 1835, the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased sixteen feet on each side, and accommodated two additional tracks.

In 1835, the matter of widening Fourth avenue from

one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to one hundred and forty feet.

Fourth avenue was not opened until nearly twenty years after the construction of the defendant's road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each of the lots across which it
(479) passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York and Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legislature passed an act to improve and regulate the use of Fourth avenue in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels and openings as were therein described. It provided that from Fifty-sixth to Ninety-sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose

of facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclu-
(480) sively for the uses and purposes of the railroad company, and that the legislature might at any time alter, amend or repeal that act.

This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that point consisted in taking down the old viaduct and erecting a new one of the same height, but fifty-six feet wide. It was completed in 1873, in which year the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railway for four hundred and one years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, fourteen years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832, when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building used as a dwelling house. Since

June, 1887, she has been the owner in fee and in possession and occupancy of the premises thus purchased.

Since the lease to the New York Central and Hudson River Railroad Company it has maintained and operated the railroad upon such viaduct and runs thereon a large number of trains during the day and night drawn by locomotives, and in its operation steam, smoke, noxious and unpleasant gases, vapors, coal, soot, cinders, ashes and sparks have been and are frequently emitted from such locomotives which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady and natural passage of light is interrupted, and dark shadows and bright
(481) flashes of light are produced. The viaduct and railway structures are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use and operate a railroad thereon.

The viaduct is about forty feet from the building line upon Fourth avenue. Of this, twenty-five feet in width on each side are used as a roadway for teams, carriages and other vehicles, and fifteen feet as a sidewalk. The street-line is now forty-two feet from such viaduct, while before the widening of Fourth avenue the street line was only thirty-eight feet from the viaduct as first constructed.

Joseph Ullman for appellant.

Ira A. Place, Alexander S. Lyman and *Hamilton Harris* for respondents.

(482) MARTIN, *J.* It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its

(483) embankment to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance.

The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light and air were obstructed, except in the manner stated. Therefore, the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would.

It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's
(484) and the defendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain and operate its road in the center of the avenue where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and was upon her part an irrevocable grant to the New York and Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances or injuries resulting from the operation of the road.

When that right was granted, Fourth avenue was but one hundred feet in width, and the viaduct or embankment first constructed by the defendants was at most but thirty-eight feet from the exterior street line. Since that time the street has been widened to one hundred and forty feet, so that the street line is now forty-two feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by non-user unless there is a loss of title in some of the ways recognized by law. Mere non-user,

however long continued, does not create an abandonment. (*Welsh* v. *Taylor*, 134 N. Y., 450; *Haight* v. *Lit-*
(485) *tlefield*, 147 N. Y., 338.) Therefore, as between the plaitiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendant effected such a release and abandonment is obvious. (*White* v. *M. R. Co.*, 139 N. Y., 19; *Foote* v. *M. E. R. Co.*, 147 N. Y., 367; *Ward* v. *M. E. R. Co.*, 152 N. Y., 39.)

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorporation, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights were reserved and granted, subject to the approval of the mayor, aldermen and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred, the New York and Harlem Railroad

(486) Company purchased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street and opened on each side of the defendants' railroad streets for teams and foot travelers as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire, the title of the New York and Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefore the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. Gown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she or her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting (487) a plan for the improvement of Fourth avenue. By that act the railroad corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers of the municipality were forbidden to obstruct the improvement or use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose and to the width of the present structure, so that, unless the plaintiff has some right in the street which is superior to that of the defendants and to the combined power of the legislature and municipality, this action cannot be maintained.

It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining and opening its railroad was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown and the combined authority of the legislature and municipality. "The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be incroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." (*Wormser* v. *Brown*, 149 N. Y. 163, 171.) As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequencial damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. (*Forbes* v. *R.*,

W. & O. R. R. Co., 121 N. Y. 505, 518.) Where a railroad is built in a public street or highway with
(488) proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 112.)

The cases of *Reining* v. *N. Y., L. & W. R. R. Co.* (128 N. Y. 157) and *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108) in no way impair the doctrine of the *Uline* and *Conklin* cases. Nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that before an established street can be closed against such owner he would be entitled to compensation. In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York and Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee

to the twenty-four feet of land deeded by Mrs. McGown to the New York and Harlem Railroad Company. In whomsoever the mere naked title to the twenty-
(489) four feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiffs' grantor, was not intended to be affected, but to remain in the defendants as a protecton to their right, so long as the road was operated in that avenue and the time mentioned in the grant had not expired.

Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank Note Co.* v. *N. Y. E. R. Co.* (129 N. Y., 252) this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air and access. In *Wormser* v. *Brown* (149 N. Y. 163) this court determined that an interference with the view from the plaintiff's windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originated. *In People ex rel. N. Y. & H. R. R.* v. *Commissioners of Taxes* (101 N. Y. 322) the judgment of this court was to the effect that the tunnels, tracks, superstructures, substructures, stations, viaducts and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in view of the fact that the city was

forbidden to obstruct the improvement or the use of Fourth avenue above Forty-second street for that purpose. Under the circumstances of this case, it is
(490) manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands open as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from twenty-six to fifty-six feet was an additional burden upon the plaintiff's land, and therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties and covered by her grant.

Moreover, when the plaintiff purchased her premises,

the defendants' viaduct had existed for many years, had occupied the entire portion of the street where it
(491) now stands, and was used substantially as when this action was commenced. She purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and, hence, lost nothing by being deprived of any of her otherwise appurtenant easements.

Under these circumstances we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion.

The judgment should be affirmed, with costs.

All concur, except PARKER, *Ch. J.*, not sitting.

Judgment affirmed.

OPINION IN THE LEWIS CASE, THE LEADING CASE IN THE COURT OF APPEALS ON THIS SUBJECT.

Court of Appeals.

MARY J. LEWIS, Appellant and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD, Company, *et al.*, Respondents and Appellants,
Impleaded with the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD Company, Defendant.
} 162 N. Y., 202.

Argued January, 1900; decided February, 1900.

(218) VANN, *J.*: The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the
(219) Harlem Company, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro., Sec. 369; *Baker* v. *Oakwood*, 123 N. Y., 16.)

The situation, when the Harlem Company entered Fourth avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down

on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company " to take possession of the ground owned by the " former and had ordered the latter to construct its road thereon, with leave to use the street for " the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company, itself. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y., 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or
(220) the nature of its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro., Sec. 368; Code Pro., Sec. 81; 2 R. S., 293, Sec. 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty

years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the intention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt* v. *Ogden*, 1 Johns., 156; *Smith* v. *Burtis*, 6 Johns., 197; *Jackson* v. *Johnson*, 5 Cow., 74; *Jackson* v. *Brink*, 5 Cow., 483; *La Frombois* v. *Jackson*, 8 Cow., 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend., 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y., 108; *Doherty* v. *Matsell*, 119 N. Y., 646; *Kneller* v. *Lang*, 137 N. Y., 589; *DeLancey* v. *Piepgras*, 138 N. Y., 26; *Heller* v. *Cohen*, 154 N. Y., 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss., 380; Am. & Eng. Encyc. of Law (2nd ed.), 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which
(221) recited that the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no

evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street wherever the city required it. It entered under a license and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon a deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y., 458.) The city did not know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a land owner is not compelled by the Recording Act to watch the records for conveyances of his own property.

(222) To authorize the presumption of a grant, the enjoyment " must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." (*Flora* v. *Carbean*, 38 N. Y., 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y., 263; *Parker* v. *Foote*, 19 Wend., 313.) When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the de-

fendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are
(223) paid upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision upon grounds equally tenable in either jurisdiction. While the defendants acquire no right by adverse possession, as against the city, they acquire certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances,

resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 135, N. Y., 341, 345; *Lord* v. *Atkins*, 138 N. Y., 184, 191; *Haight* v. *Littlefield*, 147 N. Y., 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations.
(224) (*Woodruff v. Paddock*, 130 N. Y., 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements [4th ed.] 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, Sec. 160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115, U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been consid-

ered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no dam-
(225) ages on account of any new structure erected in the same place within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiffs, where the defense of prescriptive

right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v. Calkins*, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Styles v. Hooker*, 7 Cow. 266.) As was said by Judge Andrews in *Prentice v. Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted, user according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore,
(226) was entitled to recover for the additional injury to her propery so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change

of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not effect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, (227) should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R. R.* v. *Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the tem-

porary trestles, which were a part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly, they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass on the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within
(228) the lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced. Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohn* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R. R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion
(229) and through an independent agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as

the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R.R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R.R. Co.*, 28 App. Div. 379, and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R.R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R.R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

Parker, *Ch. J.*, Bartlett, Martin, Cullen and Werner, *JJ.*, concur; Gray, *J.*, not sitting.

Judgment affirmed.

OPINION IN THE FRIES CASE, WHERE THE LEWIS CASE WAS LIMITED.

Court of Appeals.

GUSTAV R. FRIES, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Apellants.
} 169 N. Y., 270.

Argued April, 1901; Decided December, 1901.

O'BRIEN, *J.*:

The plaintiff is the owner of a three-story frame
(273) building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of
(274) much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain stat-

utes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants " acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned as follows: "The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: " That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-

(275) nine feet wide. Said work was done under the supervision of the Board for Park Avenue im-

provement above 106th street, and the said structure was completed and accepted by the defendants on February 16, 1897. That neither of defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no find-

ing and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act
(276) of the defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, it is

held to be *damnum absque injuria*. (*Radcliff's*
(277) *Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id. 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.*, v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dis.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423). The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. (*Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said
(278) to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the

principle laid down in the *Rauenstein* case, the other cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603.) The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February 1897, it was found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no
(279) application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opnions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y., 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first case, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be controlled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties appealed from a small judgment and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far as it appears
(280) upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the

defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the State under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y., 559; *Hine* v. *N. Y. El. R. R. Co.*, id., 571; *Kearney* v. *Met. El. Ry. Co.* 129 id., 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id., 393).

(281) It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult

to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and Lexington avenues and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on another avenue
(282) where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J.:

Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences whatever they may be, unless the
(283) law itself provides compensation for injuries of that character. This is the rule where public

works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R. R.* (23 id. 42); *Selden* v. *D. & H. C. Co.*, (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R. R. Co.* (50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R. R. Co.* (101 *id.* 98, 107;) *Conklin* v. *N. Y., O. & W. Ry. Co.* (102
(284) id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.*

(135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot* v. *N. Y. & H. R. R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases. While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of a viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains.

(285) It seems to us that this distinction requires us to apply the general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'Brien, I still think that the decision about to be

made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

CULLEN, *J.* (dissenting).

I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R. R. Co.*, 151 id. 155.) 2. That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R. R. Co.*, 50 N. Y. 206; *Forbes* v. *R. W. & O. R. R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appropriation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R. R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the grade of
(286) a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y. L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under

another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other, which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn.* That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he is en-

titled to compensation. To relieve the defend-
(287) ant from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for stricly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y., 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in

the later case. In the *Conabeer* case the trial
(288) court found as a matter of fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the maintenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of

the court related merely to that subject I should
(289) be content to confine myself to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

OPINION OF COURT OF APPEALS IN THE MUHLKER CASE, WHERE THEY OVERRULED THE LEWIS CASE PREVIOUSLY DECIDED BY THEM.

Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants and Respondents.
} 173 N. Y., 549.

Argued October, 1902, decided February, 1903.

PARKER, *Ch. J.*:

The facts in this case present the same question that was before this court in the *Lewis Case* (162 N. Y.
(551) 202) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging

to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra.*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made necessary a change in the grade of defendant's railroads, and the act provided that such
(252) changes should be made as soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the

State, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater* v. *Trustees of Vil. of Canandaigua*, 124 N. Y., 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for
(553) the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in the late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by

the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter
(554) conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did

not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'Brien and Judge Martin. In the course of Judge O'Brien's opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in
(555) consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*"

Judge Martin states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's prem-

ises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensaton than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the
(556) grade of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point. There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain

easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as it did, without compensation to the
(557) abutting owners. Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as re-

sulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting).

This in one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground that he was limited in his recovery by an
(558) improper rule as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the

right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed
(559) to the Harlem Railroad Company 24 feet in Fourth avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y., 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs* v. *Phillips,* 103 N. Y., 77.) Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these tes the city began condemnation proceedings to widen Fourth avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed some time in the year 1850.

The changes in Fourth Avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new state of affairs as to the grade of the
(560) tracks, both on viaducts and in cuts, which were not completed until 1878. It therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in ques-

tion, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroads tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park Avenue. The title of chapter 339 of the Laws of 1892 reads: " An act to regulate, improve and enlarge Park Avenue above 106th Street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad,* and for the construction of a new railroad
(561) bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge,* and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies.

The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th Street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by section thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th Street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or negligence, in the performance
(562) of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad com-

pany, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smoke-stacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation, and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

(563)

These cases present a situation covered by the case of *Reining* v. *N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the

exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here, and that the de-
(564) cision in the *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that

the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty-four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting). I concur in the opinion
(565) of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall

regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, *JJ.*, concur with PARKER, *Ch. J.*, BARTLETT, *J.*, reads dissenting opinion, and CULLEN, *J.*, concurs in memorandum; GRAY, *J.*, not sitting.

Judgment reversed, etc.

OPINION IN THE KEIRNS CASE NOW BEFORE THIS SUPREME COURT FOR REVIEW.

Court of Appeals.

JOHN KEIRNS, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al., Appellants.*
} 173 N. Y., 642.

Argued November, 1902; decided February, 1903.

Per Curiam.—Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R. R. Co.* (169 N. Y., 270), and *Muhlker* v. *N. Y. & Harlem R. R. Co.* (173 N. Y. 549).

VANN, *J.* (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R. R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries* v. *N. Y. & Harlem R.R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by

user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's user for twenty years
(643) asquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run, to be changed; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners, and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker vs. N. Y. & Harlem R. R. Co.*, 173 N. Y., 549.)

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was

argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, *Ch. J.*, BARTLETT, HAIGHT, MARTIN and WERNER, *JJ.* (and VANN, *J.*, in memorandum), concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

OPINION IN THE KRIETE CASE.

Court of Appeals.

HEDEWIG KRIETE, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 175 N. Y., 484.

Argued May, 1903; decided June, 1903.

Per Curiam:

We decide on authority of the *Fries Case* (169 N. Y., 270), and the *Muhlker Case* (173 N. Y., 549), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant.

The constitutionality of the statute being questioned, we hold (1) that it does not violate the State Constitution, (2) that it does not offend against that provision of the 14th amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article 1 of the Federal Constitution forbidding the impairment of the obligation of a contract.

The judgment should be reversed and the complaint dismissed, without costs.

PARKER, *Ch. J.*, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, *JJ.*, concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

There was no opinion of the Court of Appeals in the Birrell case now before this Court for review.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1884.

No. 342.

PATRICK KIERNS,
Plaintiff in Error,

against

THE NEW YORK & HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

Brief for Plaintiff in Error.

ALFRED B. CRUIKSHANK,
Of Counsel for Plaintiff in Error.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

PATRICK KIERNS,
Plaintiff and
Plaintiff in Error.

against

THE NEW YORK & HARLEM RAILROAD COMPANY and the NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendants and
Defendants in Error.

October Term.
No. 203.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Proceedings.

This is one of the viaduct cases, involving the same questions as were decided in the Muhlker case in this Court April 10th last. The plaintiff's property is on the next block to the Muhlker property, and the title and history of the controversy are almost precisely the same. The case comes up

from New York upon a writ of error granted by Chief Judge Parker of the Court of Appeals, directing the Supreme Court to return here for review a judgment in equity entered upon a decision of the Court of Appeals reversing a judgment of the Appellate Division of the Supreme Court, First Department, State of New York, which affirmed a judgment in favor of the plaintiff and against the defendants, by which defendants were directed to pay to the plaintiff certain damages suffered by reason of trespasses upon his easements of light and air to his premises on Park avenue, New York City, with the alternative of an injunction against operating defendants' railroad upon the viaduct in question.

The action was begun September 23rd, 1897, and was in form an action to enjoin the maintenance and operation of the defendants' elevated and viaduct railroad in Fourth avenue. The complaint alleged title of plaintiff and possession of premises southeast corner of 114th street and Fourth avenue, New York City, and that the avenue has been since prior to 1870 a public street opened and established under the Act of 1813, the title whereof was acquired and held by the City in trust for street uses; that plaintiff as an abutting owner had easements of light and air appurtenant to said premises, and that the defendants had constructed and were operating a steam railroad over the surface of the avenue in front of said premises; that they had formerly excavated a cut in the street, and that they are now maintaining an elevated railway structure of steel and iron upon which their road is operated, whereby the easements of light, air and access appurtenant to said premises are interfered with and are likely to be permanently interfered with.

The answer, common to both defendants, admitted in a qualified way the street uses and trust as declared, but claimed a right to erect the structure and operate the road superior to said street rights; admitted its intention to permanently operate the road; set forth the history of the incorporation, and the agreement of the Board of Aldermen, hereinafter referred to; the widening of Fourth avenue in 1887 to one hundred and forty feet; the acquisition by defendants of the title and fee of a strip of twenty-four feet in the center of Fourth avenue, and the right to slope an embankment of its railroad structure thereon; the Act of May 14th, 1872, authorizing the making of a cut in the road-bed and the operation of the railroad therein, and the enactment of Chapter 339 of the laws of 1892, which authorized the erection of the viaduct structure in question. The answer also set up the Statute of Limitations and the prescriptive right to its present occupation of the street.

The case was tried before Mr. Justice Lawrence in November, 1900, and he made a decision and findings to the effect that prior to August, 1894, the road was operated along the centre of the avenue on a masonry embankment or viaduct about three feet high and fifty-six feet wide, bounded by parapet walls of stone (Third Finding, Record, p. 16), and that by virtue of user and occupation on the part of the defendants, and acquiescence by the plaintiff, and various legislative acts, the defendants had the right as against the plaintiff, to maintain and use the road as it was used prior to August, 1894. The Court then found in its Fifth Finding, that in compliance with and pursuant to Chapter 339 of the laws of 1892, and under the supervision of the Board for Park Avenue

Improvement, the present viaduct structure was erected, being about thirty-five feet high by about fifty-six feet wide, and that the New York Central Railroad began to operate its trains on that structure February 16th, 1897, and has since continued the same, and intends so to continue, and that said structure and operation are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easements of light and air appurtenant to said premises, and interference therewith and deprivation thereof, and thereupon granted a money judgment of $1,296 for past rental damage, and an injunction for the future against maintaining and operating the viaduct structure in front of plaintiff's premises with the alternative, at defendants' option, of obtaining a proper conveyance from plaintiff on payment of $2,525 fee damage to said premises. Upon that decision judgment was entered January 18th, 1901, in the Supreme Court of New York County, and upon defendants' appeal to the Appellate Division of said Supreme Court, which is the final tribunal in matters of fact in that State, the said judgment was affirmed.

Thereupon the defendants appealed to the Court of Appeals, where the judgment was reversed and the complaint dismissed without costs, upon the authority of the *Fries* case (169 N. Y., 270), and of the *Muhlker* case (173 N. Y., 549). This reversal was made upon the ground decided in the Fries and Muhlker cases, that under Chapter 339 of the laws of 1892 the defendant railroad companies were authorized to erect and operate the structure in question. Thereupon it appeared by the judgment of the Court of Appeals that certain constitutional questions had been raised in

that Court, and decided against the plaintiff-in-error and a writ of error was granted as aforesaid and the cause brought here for review.

The Constitutional Questions Raised by This Proceeding.

In the remittitur of the Court of Appeals containing its final decision in this matter, it is said (Record, p. 1).

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to Section 1 of Article XIV and the amendments thereto, and of Section 10 of Article I thereof; and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

Thus it conclusively appears that the constitutional questions and claims of plaintiff-in-error were before the Court below and were decided in a manner to justify a review thereof in this Court.

Assignment of Errors.

The assignment of errors (*Record*, pp. 63-66) is amply sufficient to bring up for review all the questions discussed in this brief. The grounds therein stated are that the Court of Appeals erred in dismissing the complaint and in holding that under the New York statute the plaintiff had no

remedy against the defendants, and that he might be deprived of his property without due process of law and without compensation and in sustaining as constitutional the statute, Chapter 339 of the laws of 1892, referred to, and in sustaining the authority exercised under said statute to take and appropriate plaintiff's property without due process of law and in sustaining the statute and decision, the effect of which was to deprive the plaintiff of said property, specifying the easements of light, air and access, and further erred in deciding that the defendants were under no liability to compensate the plaintiff, and in so deciding as to impair the obligation of the contract established by the deed in question, and in deciding that the defendants were protected from such liability to plaintiff by the authority of the statute.

Character of Plaintiff's Premises and Effect of Defendants' Trespasses Thereon.

The plaintiff's premises have a frontage of one hundred feet on Park avenue and extend seventeen feet five inches on 114th street. The building is a three-story house, occupied as a private dwelling for about fifteen years. The railroad runs opposite the third or fourth story. The evidence showed the usual interference with the easements; smoke, cinders, flashes of light caused by the escaping steam; noise, vibration, etc. There was a falling off in rental receipts of nearly one-half, and the decline of the fee value was estimated by experts at about $10,000. The judgment of the Court was for only one-quarter of that sum fee damage. It appeared upon the trial that since the erection and

operation of this viaduct it has been almost impossible to let or sell property in that neighborhood.

History of Defendants' Road, and of Plaintiff's Title.

In these respects this case is almost precisely on the same facts in the *Muhlker* case, decided in this Court April 10th, 1905.

By the laws of 1807, Chapter 115, a commission was appointed to lay out the streets of the City of New York, and to make and file a map thereof (Record, p. 22). A map was accordingly made and filed by these commissioners in 1811, and was put in evidence in this case (*Plaintiff's Exhibit "F"*, Record, p. 46). This map or plan was declared by the statute to be conclusive in respect to the City as well as to the owners and occupants of houses and tenements. A copy of the material parts of said statute is printed in the appendix to this brief.

The effect of a map prepared and filed as this one, has been before the New York Courts on more than one occasion, and it has been declared that the preparation and filing of such a map pursuant to legislative authority involves the dedication of the lands designated on the map to the corporate use of a municipality, or for the benefit of the corporation on whose behalf this map was filed.

Rochester & L. R. O. Co. v. N. Y. L. E. & W. R. R. Co., 110 N. Y., 128.
Suburban R. T. R. Co. v. Mayor, etc., of New York, 128 N. Y., 510.
Pocantico Water Works v. Bird, 130 N. Y., 249.

By the laws of 1813, Chapter 86, general provision was made for the laying out of streets in the City of New York. The material parts of that Act are also printed in the appendix, and it is therein provided that all such streets shall be impressed with a trust for city uses forever.

The land in question was at that time part of farm lands belonging to one Benson, and on November 19th, 1825, he made a deed to the Mayor, Aldermen and Commonalty of the City of New York, which was recorded December 26th, 1825, L. 196, p. 261, conveying certain strips of land laid out as streets on the map of the City of New York, and among others, Park, formerly Fourth avenue, of the width of one hundred feet in front of the premises in suit.

> "To have and to hold all and singular the said pieces or parcels of land, hereditaments and appurtenances and every part and parcel thereof, doth in and by these premises release and confirm unto the said parties of the second part, and to their successors, to the only proper use and behoof of the said parties of the second part and their successors, forever, in trust, however, that the same be appropriated and kept open as parts of public streets and avenues forever in like manner as the other public streets and avenues in the said city, are and of right ought to be."

On November 12th, 1828, a deed was made from Benson to Archibald Watt, which was recorded the same day in the Register's Office, New York County, in L. 241, p. 497, conveying the premises in question with others, partly by description and partly by reference to a map made by one Bridges, showing survey of September 25, 1825, and which

was filed at the same time that the deed was recorded. This Bridges map showed the streets in that neighborhood, including Fourth avenue, and the plaintiff's front thereon. The plaintiff derived title through said Benson.

Next in date is the charter of the defendant companies, Laws 1831, Chapter 263, which gave the company power to construct a single or double railroad from 23rd street to the Harlem River; to transport passengers and property "by the power and force *of steam or of animals* or of any mechanical or other power" for the term of thirty years, with power of condemnation of necessary real estate.

By said charter it was further provided as follows (Section 16):

> "Nothing in this act shall be deemed to authorize the said corporation to construct or use their single or double railroad or way *across or along* any of the streets or avenues as designated on the map of the city of New York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way *across or along said streets or avenues*, or prohibit them from constructing the same, and after the same shall be construed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof."

There was no hint of an elevated railroad in this charter; an old-fashioned surface road was alone indicated.

On December 16th, 1831, an ordinance was

passed authorizing the New York & Harlem Railroad Company to construct its railroad, and pursuant to that ordinance an agreement was made on January 9th, 1892, between the New York & Harlem Railroad Company and the City of New York wherein said ordinance was incorporated, by which the railroad company agreed "to stand "and abide by and perform all the conditions and "requirements in said ordinance contained" (Record, p. 50).

By this agreement the company is permitted, in pursuance of its charter, to construct a double or single track railroad or railroads along Fourth avenue, the width not to exceed twenty-four feet, *provided* that if it should appear that said railway constituted "an obstruction or impairment to the future regulation of the city *or the ordinary use of any street or avenue*, it might be required to remove the railway." The right of regulating the description of the power to be used was reserved to the city. Further, "that said company shall make the railroad path from time to time to conform to whatever may hereafter be the *regulation of the avenue or road* through which the railroad passes." If the railroad should not be completed or should be discontinued, the strip of land was to be thrown open as a part of the public avenue.

Everything is perfectly clear up to this time. The plaintiff's predecessors owned the premises fronting on Fourth avenue, which had been laid out, and though not opened, had been fully dedicated as a street. The city had taken a deed of the bed of the street in trust for street purposes, forever, so that it had been doubly dedicated to

street uses. The railroad company had a license merely to lay its tracks and operate its railroad along the surface of Fourth avenue. This occupation and operation of defendants' road was not inconsistent with the street use, and was not at that time considered to be thus inconsistent. The charter of the company allowed it to move its cars by either animals or steam power, and the trains operated in those early days were few in number, small in size, and caused the least possible inter-owners.

Now on January 18, 1832, the same Benson made a deed to the New York & Harlem River R. R. Company, which, however, was not recorded until August 18th, 1835, conveying to the railroad company a strip 24 feet wide, running through the centre of Park Avenue between 106th and 116th Streets. This deed was executed *seven years after* the deed by Benson to the city and was not recorded until *ten years thereafter*, and therefore it seems to us that it cannot have the slightest possible value in this case.

In 1835 a petition was presented to the Common Council of the City of New York, with the result that it was finally resolved in 1837 that measures be taken to widen the avenue to the width of 140 feet, and Chapter 274 of the laws of 1837, provided for that widening. In 1850 proceedings were inaugurated for the actual opening of Fourth Avenue, and commissioners were appointed, the report was confirmed by the Special Term, and finally affirmed by the General Term of the Supreme Court, June 20, 1854. A map is in evidence (*Plaintiff's Exhibit Q*, Record p. 47), which was filed as a part of said proceedings, and shows the street as one hundred and forty feet

wide and the railroad in the centre thereof twenty-four feet wide.

In 1872 by Chapter 702 of the laws of that year, the road was authorized to widen its track and to change the grade, which was done, so that in front of plaintiff's premises the road from 1872 to 1894 was upon a masonry embankment or viaduct about three feet high and about fifty-six feet wide, and bounded on both sides by parapet walls of stone having a height of six feet above the surface of the avenue. (*See Judge Lawrence's 3rd Finding, p. 16*).

This was the condition of the road and of the street on which the road was operated up to 1892, when this metallic viaduct complained of was erected under the pretended authority of Chapter 339 of the laws of 1892, the present structure being about thirty-five feet high, on which trains are run by defendants day and night on a line with the fourth story of the plaintiff's premises, seriously impairing his easements of light and air to his great pecuniary damage and the enrichment of defendants.

FIRST POINT.

The decision in the Muhlker case is controlling, and requires a reversal of this judgment.

The questions presented to this Court by the writ of error and assignment of errors are substantially the same as those presented in the *Muhlker* case. The remittitur from the Court of

Appeals in this case states the Federal question as follows:

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892, and the acts amendatory thereof and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly of Sec. 1 of Art. 14 and the amendments thereto, and of Sec. 10, of Art. 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

And the decision in this respect is made the ground of the application for the writ of error by the assignment of errors already referred to.

In the prevailing opinion of this Court, in the *Muhlker* case, it is stated, referring to the decision below:

> "The Court (of Appeals of New York) rests its ruling on one point, the effect of the Act of 1892, under which the structure complained of was erected, the Court declaring that Act a command to the railroad Company in the interest of the public; indeed made the State the builder of the new structure and use of it by the railroads mere obedience to law. But it does not follow that private property can be taken over by the erection of the structure or its use."

From this and the following language of the opinion in the *Muhlker* case it is clear and certain that the question decided in that case was the question attempted to be raised here; that is, the validity and constitutionality of Chapter 339 of

the Laws of 1892 of the State of New York. The facts in both cases were the same. In both cases the easements consisted of light and air appurtenant to premises fronting on Fourth avenue, New York City. In both cases these easements have been appropriated by the defendants without compensation, and in both cases that appropriation was attempted to be justified under Chap. 339 of the New York Laws of 1892, which directed the erection by defendants of a viaduct, in the course of which erection these easements were necessarily taken.

SECOND POINT.

Following the Muhlker decision, it must be held that the judgment of the New York Court of Appeals in this case contravenes the several provisions of the federal constitution invoked by the plaintiff in error.

The provisions of the Federal Constitution under which plaintiff in error claims the right to a review and a reversal in this Court are the two mentioned, namely, that no state shall pass any law impairing the obligation of contracts (Art. 1, Sec. 10), and that no state shall deprive any person of property without due process of law (Am. 14).

In this case the application of these several provisions is scarcely distinguishable. All three are intended and effective to protect property and

property rights. A contract is property, and all property, except that of the most primitive kind, is the result of contracts, and of services performed under contract. Substantially all property depends for its existence upon the performance of present contracts, and may be destroyed by their violation. The judgment under review sustained the validity of the state law (Chap. 339 of the Laws of 1892), which authorized the erection of the viaduct complained of, without compensation, and also sustained the acts performed and the authority claimed under it.

In the suit below there had been drawn in question the validity not only of the statute *but of the authority exercised under the same* (U. S. R. S., Sec. 709, Record, p. 1 Remittitur). By this authority exercised under the statute the property of the plaintiff was taken without compensation, and without process of law. It is not even pretended that compensation was provided, nor that there was any process of law whatever.

Now it has been held by the decision in the Muhlker case that the easements taken were in fact property. The opinion cites approvingly *Barnard* vs. *Johnson*, 15 *N. J. Eq.*, 481, and Lewis "*Eminent Domain*," Sec. 91-C where it is stated that

> "These rights or easements of light, air and access as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Similarly under the opinion in the *Muhlker* case, the effect of the New York Statute was to impair the obligation of a contract. It was held in that case that the City of New York held the street

under a trust which constituted a contract to the benefit of which plaintiff was entitled. The respective claims of the contending parties in the present case are practically the same as in the Muhler case. The *Kierns* property is on the southeast corner of 114th St. and Fourth Avenue, while *Muhlker's* property was on the northwest corner of 115th St. and Fourth Avenue. The title to both the properties is nearly the same. *Kierns* acquired under Benson; *Muhlker* under *Benson* and *Poillon;* and *Benson* had previously conveyed the fee to the bed of the street to the City of New York, in trust, for street uses, by deed recorded December 26, 1825.

This deed to the City in trust was the first deed made or recorded appearing in the record herein.

Seven years afterwards, *Benson* both in this case and in the *Muhlker* case attempted to convey to the Railroad Company a strip 24 feet wide, running through the centre of Park Avenue.

In both cases, therefore, that is to say, in this case and also in the *Muhlker* case, the plaintiffs and their predecessors in title, had purchased their land after Fourth Avenue had been doubly dedicated and contracted to street uses, and after contract that the street should be kept open for street purposes forever, and before the Railroad had acquired or claimed any rights whatever; and in both cases the parties had purchased under the assurance of a long line of New York decisions, which had declared and established the rights of abutting property owners upon the street, including the right to light, air and access, not as new doctrines but as ancient and natural rights.

THIRD POINT.

The easements of light and air taken by the defendants were the actual property of the plaintiff.

It appears to have been argued by the defendants counsel in the *Muhlker* case that these easements either were not property at all in the constitutional sense or that they were not the property of the plaintiff, and though in fact taken by the defendants as incidental to the building of the viaduct, yet the plaintiff was not thereby deprived of anything which he could call property and deprivation whereof would give him the right to appeal to this Court for constitutional protection.

This is a remarkable claim. Certainly these easements have all the attributes of property in the ordinary sense. They are capable of being used, enjoyed impaired and destroyed and under certain usual conditions of being transferred and exchanged. The mere fact that they have no value apart from the land does not detract from their quality as property. The roof may have only nominal value when considered apart from the house or when removed therefrom. The well and the water therein may have each but nominal value when separated or the shoe may be valueless without its mate and yet each of these is property and perhaps valuable property in its proper place. The circumstance that the values of certain kinds of property can only be measured by the effect of their loss, does not in the least prevent or recognize the reality of their values when so measured. A man's right hand may have no value apart from the body; its value is only

measured by its loss and yet it is none the less capable of legal ascertainment.

And not only is it clear that these easements constitute valuable property but that they are the actual property of the plaintiff. The first and in this case, the controlling proof on that subject is that the plaintiff and her predecessor in title had actually and notoriously possessed and enjoyed these easements as property and had derived revenue therefrom up to the time of the trespasses complained of. Is there any better prima facie proof of property rights than the notorious open and undisturbed and undisputed possession thereof? Such was the possession of plaintiff and predecessors of these easements from the year 1882 when this house was built, up to 1893 when the easements were taken by the defendants. During all that time the plaintiff and her predecessor had uninterrupted open and notorious enjoyment of these easements as property and was deriving large rents therefrom which are set forth in the record. Every passer-by, every agent of the defendants saw or might see this possession every day of his life.

And prior to that time the actual right to these easements existed as far back as the filing of the map by which the street was dedicated. And even prior to that time at the moment when this lot first became the subject of private ownership there was a potential right in the owner to an easement of light and air upon whatever street his property should thereafter face, this right being founded upon the very commonest habits and customs of civilization. And this property and its notorious enjoyment was never taken from plaintiff or from her predecessors or seriously

disturbed until defendants took it by the acts complained of here.

The defendant claims a prescriptive right to their railroad as actually used by them and that right as far as established is conceded; but what of plaintiff's right to these easements founded on not only in prescription but in actual possession?

The Court will look in vain for any assertion of a shadow of a claim on the part of defendants to interfere with those easements made prior to the passing of the act of 1892.

In 1807 the avenue was dedicated to the public use as a street by the statute (Laws 1807, Chap. 115).

In 1811 the map was filed pursuant to this statute, whereby the dedication of the street was perfected.

In 1825 Benson the owner of the land forming the bed of the Street deeded the same to the City of New York in trust for street uses.

In 1831 the railroad was allowed to lay its tracks and operate its road through the center of the street by the consent of the common council under what was practically a license. As was said by Judge Vann, in the *Lewis* case (162 N. Y. 221): "It entered under a license and remained under "a license. Its unbroken continuity of possession "from that day to this has never been accompan- "ied with an assertion of any claim hostile to the "city."

In 1832 the railroad condemned the strip of land twenty-four feet wide which was all it used at that time, and on which it operated a surface railroad only.

In 1853 the City condemned that strip and took the title to it under condemnation proceedings, the road being still a surface road.

In 1872 the legislature authorized a change of grade and a four track road.

Now from 1832 to 1872, a period of 40 years, this road had been operated as an ordinary surface railroad. Up to that time there had not been the slightest interference with plaintiff's easements of light and air appurtenant to these premises and very little interference with the access. It was the ordinary case of the operation of a surface railroad. Under the act of 1872 the tracks were sunk and access was interfered with, and the Courts have held that the easements of access then taken from the abutting owners were established by acquiescence and prescription and could not be recovered after twenty years enjoyment by the railroad company, but still the easements of light and air, the taking of which we now complain, had not been disputed. Plaintiff's building was erected in 1882 and plaintiff and the other tenants of these handsome apartments actually possessed and enjoyed those easements for ten years thereafter until this act of 1892.

Therefore they are not only plaintiff's property by right of title but by prescriptive right; by the best of all possible rights that of long notorious and undisputed possession and enjoyment under color of title.

On the defendants by every fundamental rule of law and evidence rests the burden of establishing their right to keep what they seized and took from us by the high hand in 1894; they cannot sustain that burden by mere reference to a State statute; of other defense there is none in this record.

FOURTH POINT.

The New York Court of Appeals had no power to deprive these easements of their full value or character as property, and made no pretense of doing so by its decision herein.

In the *Muhlker* case, defendants' counsel argued that the effect of the decision of the Court of Appeals was that under the local property laws of New York, plaintiff had no easements of light and air in these premises in 1892 capable of being taken by the defendants, and that by that decision this Court was foreclosed from examining into the facts and from deciding that plaintiff's property rights had in fact been invaded by the proceedings under the statute of 1892. Such a construction of the Constitutional provisions referred to would practically amount to their nullification or would permit such nullification or evasion at the option of the State authorities. The provisions of the Federal Constitution are that the State shall not pass any law impairing the obligation of contracts and that private property should not be taken for public use without just compensation, nor without due process of law. The remedy is not confined to cases where the State courts *admit* that the Constitution has been violated or deny its principles but extends to all cases where it has in fact been violated. Were it otherwise the Constitutional protection would be of little value.

If private property is in fact taken without process of law or without compensation the citizen is entitled to come to this Court for his rem-

edy even though the State Court may say that which has been taken is not in fact property.

Thus this Court will construe a contract in order to ascertain for itself whether it has been impaired under State authority notwithstanding the State Court construction to the contrary.

McCullough v. Commonwealth of Virginia, 172 U. S., 102.
Columbia Water P. Co. v. Columbia St. R. Co., 172 U. S., 475.

In both these cases it was held that it was the duty of the Supreme Court to look into the record to ascertain what in point of fact was done in the State Courts and whether the Constitution had in fact been violated in the matters complained of.

Here, as a matter of fact, the New York Courts have never for a moment pretended that these easements did not constitute property. The doctrine that easements of light and air appurtenant to real estate in the City of New York and elsewhere do constitute property for the taking of which all appropriate remedies may be had was thoroughly established in the elevated railroad case of *Story v. E. R. Co.*, 90 N. Y., 122, followed by *Lahr v. El. R. Co.*, 104 N. Y., 268, and by scores of reported and hundreds of unreported similar decisions in that State.

In the present case the trial Court found as a fact, that the plaintiff had owned during the period of her ownership as aforesaid, certain easements of light, air and access in Park avenue and appurtenant to her said premises (*decision, 1st paragraph, p. 16*), and that "the said permanent "structure and the operation of trains thereon "outside of the 24 foot strip are, and since Feb-

"ruary 16, 1897, have been, a continuous trespass "upon plaintiff's easements of light and air ap- "purtenant to said premises (*Decision, paragraph 5th, p. 17*). The value of the easements taken was also determined upon substantial evidence and the plaintiff was held entitled to judgment. That judgment was affirmed by the Appellate Division, four judges concurring. This determined the question of fact in the New York Courts.

The Code of Civil Procedure of the State of New York provides as follows (Sec. 191, Sub. Div. 3):

> "The jurisdiction of the Court (of Appeals) is limited to a review of questions of law."

While the Court of Appeals in this case handed down no opinion, yet the Federal Supreme Court, when necessary, will probably take judicial notice of the opinions in the *Muhlker* and other cases. In the *Muhlker* case Chief Judge Parker said, in the prevailing opinion:

> "Although at the time of the decision of the Lewis case we accepted as sound the proposition that when defendant commenced to use the steel viaduct it started a new trespass upon the rights of the abutting owners, for which it could properly be held liable, subsequent reflection persuaded the majority of the Court that this was error" (173 N. Y., 553).

and again

> We still think, under the authority of Radcliff's Executors *vs.* Mayor, etc., of Brooklyn, 4, N. Y., 195, and the other cases cited by Judge Martin in his opinion in the Fries case,

> that the city had power to make its improvement as it did, *without compensation to the abutting owner.*"

Similarly, in the case of *Fries vs. N. Y. & H. R. R. Co., 169 N. Y., 270,* which was the first of these cases where the right of the plaintiff to recover was denied or questioned, it is said in the prevailing opinion, p. 276;

> "I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement *for which the railroad was not responsible.*"

In the case of *Kierns vs. N. Y. & H. R. R., 173 N. Y., 642,* it was simply stated that the judgment was reversed upon the authority of the Fries and Muhlker cases. In the subsequent cases including this Birrell case there was no opinion. It is clear, therefore, that the decision of the Court of Appeals was placed upon the broad ground that the trespasses and the taking of the property of the abutting owners was justifiable, because done under the authority of the state law, and that that Court never attempted to deny the facts found by the New York Supreme Court of the value of the easements, or to modify those findings in any way. This is further shown, by reference to the dissenting opinions in the same Court. Three of the Judges, Bartlett, Vann and the present Chief Judge Cullen, wrote strong dissenting opinions, from the perusal of which it is evident that there was no doubt in the mind of any member of the

Court that the property was actually there and had been confiscated.

Judge Vann said that he regretted the result "as amounting to the confiscation of property belonging to abutting owners, and the gift thereof to railroad corporations". *Kierns case, 173 N. Y., 643.*

Defendants' claim therefore that the constitutional question was not and is not decisive of these cases is untenable.

FIFTH POINT.

The easements in question were created by contract with the abutting owners.

This point presents precisely the question decided in favor of the plaintiff in the Muhlker case (April 10, 1905). The deeds in the two cases are the same.

Benson's deed dated November, 1825, and recorded December 26th, 1825, conveyed to the City of New York the bed of Fourth Avenue in front of the premises in suit with *habendum* in trust that the same be appropriated and kept open as part of and in like manner with other public streets and avenues in said city. The deed to the railroad company was dated in 1832, seven years after and recorded April 18, 1835, ten years after the deed to the city. Under the recording act, therefore, the deed to the railroad company was void as to the City and those claiming under it. (*See Recording Act, N. Y. Revised Laws of 1813, vol. 2,*

p. 406; New York Revised Statutes, vol. 1, p. 756, Sec. 1.)

The city of New York had due legal authority to accept the deed from Benson to the city.

Vail v. *L. I. R. R. Co.*, 106 N. Y. 283, 287.

Hughes v. *Bingham*, 135 N. Y. 347, 352.

These deeds amounted to a contract and were within the protection of the clause of the Federal Constitution which provides that no State shall pass any law impairing the obligation of contracts.

Fletcher v. *Peck, 6 Cranch* (U. S.) 87, 136.

Dartmouth College v. *Woodward*, 4 Wheat. (U. S. 518, 656-7.)

McGehee v. *Mathis*, 4 Wall. (U. S.) 143, 155.

Farrington v. *Tennessee*, 95 U. S. 679, 683.

Further, we have the Act of 1807 (*Laws 1807, Chap. 115; p. 275*) providing that the Commissioners' plans, surveys and maps made pursuant to that Act should be final and conclusive in respect to both the city and the owners of lands within the boundaries of the streets "and in re- "spect to all other persons whomsoever", and this Act was declared to be a public act (*Laws 1807, p. 297*). Pursuant to that Act a map was filed by the said Commissioners, in 1811, which map officially established the streets and avenues of Harlem and represented Fourth Avenue as 100 feet wide (*Record p.* 47).

Following this is Chapter 86 of the Revised Laws of New York of 1813, which provides (*Vol. 2, p. 414*) that when lands in New York City are required for public purposes "the said mayor, "aldermen and commonalty of the City of New "York shall become and be seized in fee of all the "said lands * * * in trust, nevertheless, that "the same be appropriated and kept open for, or "as part of a public street, avenue, square or "place, forever, *in like manner as other public "squares and places in said city are and of right "ought to be.*"

The filing of this map representing the streets, as required by the statute of 1807, and followed by the provisions of the State law of 1813, above referred to, amounted to a dedication of these streets to public street uses forever and to a contract between the public and the abutting owners severally, that the strips of land represented on the map as streets should remain such perpetually, with all the incidents legally appertaining thereto and such has always been the law of the State of New York.

Story v. N. Y. El. R. Co., 90 N. Y., 122; see pp. 160, 172, 177.
Lahr v. Met. El. R. Co., 104 N. Y., 268; see p. 290.
Kane v. N. Y. El. R. Co., 125 N. Y., 164, 177.

These propositions are not seriously contradicted by the defendants. The complaint alleges that Park avenue was a public street opened and established as such, and that the title was held by the City of New York in trust for public use, with certain rights of easements therein set forth,

including easements of light, air and access (*Complaint pars. 3 and 4*). There is only a qualified denial of this in the answer, that is to say, a sort of a negative pregnant,—a denial that the *whole* of the strip of land known as Park avenue is now or ever has been a public street and alleging that it was subject to the rights of the defendants to operate their railroad. In none of the State courts has defendant attempted up to the present time to deny the general proposition that the effect of the street opening proceedings in the City of New York was to create a trust as claimed above by the plaintiff herein.

Next, we have in point of time, the agreement of January 9th, 1832, between the N. Y. & Harlem Railroad Company and the City of New York, which embodied the ordinance of the common council on December 22, 1831, distinctly recognizing the existence of Fourth avenue, that it was absolutely subject to regulation and control of the City authorities and that the railroad was to be there by sufferance only. The street rights and easements thus created were recognized and continued without any interference whatever down to 1872, because the use of Fourth avenue for the purposes of a surface road was not inconsistent with street uses and therefore did not legally constitute an interference with said easements.

In 1872 there was a change in the structure of the railroad under legislative sanction whereby the road was widened and there was a cut made in the street, and parapets were erected to guard the railroad tracks, constituting an interference with the easements of access but of comparatively slight interference with the easements of light and air and said easements of light and air remained undisturbed until 1893 or 1894 when they were ap-

propriated by the defendants in the manner complained of in this case.

SIXTH POINT.

The erection of the Elevated Railroad on Fourth avenue was a perversion of the use of that avenue from its original purpose.

In the *Story* case (90 N. Y., 122, 156) the Court referring to the elevated structure on Pearl street, said: "There was no change in the street surface "intended; but the elevation of a structure use- "less for general street purposes, and as foreign "thereto as the house in Vesey street (*Corning v. "Lowerre,* 6 Johns, Ch. 439) or the freight depot "(*Barney v. Keokuk, supra*)."

In the *Lahr* case (104 N. Y., 268, 288) the Court said that such elevated railroad "is a perversion of the use of the street from the purposes originally designed for it."

So in the *Kane* case (125 N. Y., 164, 176) Judge Andrews in referring to the *Story* case, declared that that decision held and that an elevated railroad "was obstructive of the street uses for which "streets are established."

In the *Fobes* case (121 N. Y., 505) Judge Peckham said at p. 517 "Such a permanent, total, ex- "clusive and absolute appropriation of a portion "of the street as this structure amounted to was "held to be illegal and wholly beyond any legiti- "mate or lawful use of a public street" (referring to the *Story* case.)

Finally, in the *Muhlker* case, decided in this Court April 10, 1905, these decisions are approved and enforced, the Court saying that the *Story* and *Lahr* cases are in point and decisive (*Opinion, McKenna, J.*).

SEVENTH POINT.

The defendants were not under compulsory obligation to erect the viaduct structure complained of.

The learned counsel for the defendant, and a majority of the Judges of the Court of Appeals, were in error in supposing, as they seem to have supposed, that under Chap. 339 of the New York Laws of 1892, the defendants were actually compelled to erect the viaduct structure provided for by that act. The provisions thereof though in form a *command,* were in effect a *permission.*

In the construction of statutes it frequently happens that the word "may" means "shall"; that is to say, that words of permission are to be construed in a proper case as words of compulsion; and so in statutes like the present, granting a monopoly or advantage upon specified terms. the directory or mandatory words used in stating the *terms* of the permission are to be construed together *with* the permission, and as stating merely the conditions thereof.

It was treated as a permission by the company from the beginning.

The payments for the structure were made half

by the defendant Railroad Companies and half by the city, *from time to time* as the work progressed, so that in the construction of the road the defendant company took a voluntary part.

It is not to be assumed that there was an absolute necessity requiring the defendants' railroads to be operated in Fourth Avenue; there was no absolute necessity for the continuance of their depot at 42nd Street. Their terminal could have been removed to 135th Street, north of the Harlem River, with possible advantage to the people of the city. When the station at 42nd Street was originally established it was in the upper part of the residential quarter; as far uptown comparatively, as a station at 135th Street would now be. It was therefore a decided advantage to the Company to be allowed to construct this viaduct as a condition of continuing to occupy its station in Forty-second Street, and to operate its trains therefrom, instead of being required to go off Manhattan Island altogether, as it might and perhaps should have been at that time.

The statute amounted to an offer by the Legislature of New York, to be accepted by the Railroad Company or rejected as it saw fit. It probably required the Railroad Company to vacate the surface of the street which they had previously occupied, but there was no power in the Legislature to compel the Railroad Company to construct a viaduct there, nor to compel it to accept and use the same when constructed. The only penalty which could have been inflicted upon the Railroad Company, in the case of its declining to accept the proposed scheme, would have been a refusal by the State to allow it longer to continue to occupy Fourth Avenue. It was occupying the street sur-

face under a license from the Legislature and the City authorities, and the effect of the statute was to terminate that license, and to offer a new license for the use of the viaduct structure, upon the terms stated in the Act, including payment by the Railroad Company of half its cost.

That this Act of 1892 was drawn in the interest of the Railroad Company and probably by the Company's officials is evident from a mere reading of the details of the proposed work therein carefully and scientifically set forth. The facts also show that the servants of the road actually supervised the construction. Mr. Katte, a civil engineer in the employ of the Railroad Company, was one of the commissioners and superintending engineer of this work, and as such prepared the plan for the elevation of the tracks (*Record, p. 46*); Mr. Naylor, another civil engineer in the defendant's employ, was the employee of the Board for the Park Avenue Improvement (*Record, p. 44*), and there were probably others.

Upon the completion of this viaduct it was to be the property of the defendant companies, although they had paid but half of its price, and they were clothed with a monopoly of the use thereof, to the exclusion of all other railroads and persons whatsoever.

"Said improved structure and bridge shall be "*exclusively for the uses and purposes of the* "*Railroad Company* (Sec. 24). "No trains of "other companies, without such permission (of the defendants) shall be run thereon." (Sec. 26).

The command of the Act of 1892 to the defendants was *first* to vacate the surface of Fourth avenue. That command was probably within the power of the Legislature, but whether it was so or not does not concern the plaintiff. The *next*

command or permission was to contribute one-half of the price of the proposed viaduct structure in Fourth avenue which was to be used for the sole benefit of the defendants. In that scheme defendants could not be compelled to join. No doubt it was well understood in advance that the scheme was of their contriving or was known to be acceptable to them. By contributing to the construction and accepting the benefits of the plan, and by appropriating the plaintiff's easements in the operation of said scheme, the defendants adopted the responsibility thereof and ought not to be heard to disclaim it.

As was stated by *Judge Cullen* in his dissenting opinion in the *Fries* case "The situation in no "way differs from that which would have been "presented had the Legislature turned the Rail-"road Company off the street altogether, and "made it construct a new line on adjoining prop-"erty. In either case the Railroad would be "bound to pay for what it took."

To put it in another way: If the command of the statute was in substance to defendants to appropriate plaintiff's easements without compensation, then it was illegal and immoral, and they were not bound to obey it. If, on the contrary, the command was, as *Judge Cullen* intimates, upon the theory that they were to pay for the property they took in executing it, then there can be no defense to this action.

EIGHTH POINT.

The Courts, particularly in New York State, are a unit in holding that an elevated railroad cannot be erected and operated by a private corporation on public streets, without compensation to abutting owners.

It is unnecessary to argue this point at length as it will have to be conceded by the defense. A few extracts, however, from a multitude of decisions, mostly in New York courts, will tend to illustrate how this doctrine has been emphasized and enforced:

In the *Story* case, speaking of the power of the Legislature to authorize an elevated railroad structure in a street, Danforth, J., said (90 N. Y., 122, 160):

> "*This cannot be done even by the Legisla-*
> "*ture without compensation to the abutting*
> "*owner.* It would be a perversion of law and
> "reason to construe a trust to keep open land
> "for street purposes as subject to such regu-
> "lations as would destroy the street, or en-
> "able the Legislature or municipality to
> "grant away an exclusive right to any part
> "of it."

On the same subject Tracy, J., declared that the Legislature by virtue of its power to regulate and control the public uses of a street could not divert them to the construction and maintenance of an elevated railroad. He said (90 N. Y., 169):

"This is *a question of power*. If the Leg-
"islature has the power to authorize such a
"structure, without compensation, its exer-
"cise cannot be regulated by the Courts. If
"one road may be authorized to be construct-
"ed upon two series of iron columns placed
"in the street, another may be authorized to
"be supported upon brick columns or upon
"brick arches spanning the street. If a su-
"perstructure may be authorized which spans
"the entire carriageway at fifteen feet above
"the bed of the street, one may be authorized
"which spans the entire street from building
"to building, thus excluding light and air
"from the street and from the property abut-
"ting thereon."

He further says (p. 171):

"The defendant's railroad as authorized
"by the Legislature, directly encroaches upon
"the plaintiff's easement and appropriates
"his property to the uses and purposes of a
"corporation. This constitutes the taking of
"property for public use. It follows that
"such a taking *cannot be authorized*, except
"upon the condition that the defendant makes
"compensation to the plaintiff for the prop-
"erty thus taken."

He also quoted from the opinion of the Supreme Court of the United States in *Railroad Company* v. *Schurmeir* (7 Wall., 272), where that Court says:

"Attempt is also made to justify the acts
"of the respondents (the railroad company)
"as grantees of the State, upon the *ground*
"that the complainant, in dedicating the
"premises to the public as a street, levee and
"landing, parted with all his title to the same,
"and that the entire title vested in fee in the

"State. Respondents rely for that purpose "upon the statute of the Territory of Minne- "sota. Suppose the construction of that pro- "vision assumed by the respondents, is cor- "rect, it is no defense to the suit, because it is, "nevertheless, true that the municipal cor- "poration took the title in trust, impliedly, if "not expressly, designated by the act of the "party in making the dedication. *They could "not, nor could the State,* convey to the re- "spondents any right to disregard the trust, "or to appropriate the premises to any pur- "pose which would render valueless the ad- "joining real estate of the complainant."

Tracy, J., further added, with reference to the power of the Legislature (90 N. Y., 177):

"The obligation to preserve it as an open "street rests in contract written in the statute "under which the lands were taken, and "which may not be violated by the exercise "of any legislative discretion."

In *Mahady v. The Bushwick Railroad Co.,* 91 N. Y., 148, 153, Andrews, C. J., said with reference to the effect of the *Story* case:

"The plaintiff, though an abutting owner "simply, the fee of the street being in the "city, was entitled to the use of the street, "and neither the Legislature nor the city "could devote it to purposes inconsistent "with street uses, without compensation, ac- "cording to the principle of Story *v.* The "Elevated Railroad Co., 90 N. Y., 122."

In the *Lahr* case (104 N. Y., 268, 288) Ruger, J., declared that the appropriation of a public street for an elevated railroad "is a use which neither the city authorities nor the Legislature

can legalize or sanction without providing compensation for the injury inflicted upon the property of abutting owners."

As to the power of the Legislature over city streets and their regulation for street use, RUGER, C. J., decided in the *Lahr* case, 104 N. Y., 268, 292:

> "The logical effect of the decision in the "*Story* case is to so construe the Constitution "as to operate as a restriction upon the legis- "lative power over the public streets open- "ed under the Act of 1813, and confine its "exercise to such legislation as shall author- "ize their use for street purposes alone. "Whenever any other use is attempted to be "authorized, it exceeds its constitutional "authority. Statutes relating to public "streets which attempt to authorize their "use for additional street uses, are obviously "within the power of the legislature to enact, "but questions arising under such legislation "are inapplicable to the questions here in- "volved."

With reference to the legislative power to authorize the construction of an elevated railroad in the city street, Ruger, C. J., further declared in the *Lahr case,* 104 N. Y., 268-295:

> "The Legislature, as we have seen, had not "power to authorize the street to be used for "an elevated steam railroad, and that want "of authority extends to every incident nec- "essary to make the road an operative ele- "vated steam railroad, which occasions in- "jury to the rights of abutters on the "street."

In the *Kane* case, speaking of the power of the

Legislature over the city streets, and of the limitation upon that power, Andrews, C. J., said (125 N. Y., 183):

> "We have, then, an express and deliber-
> "ate legislative declaration of a trust in re-
> "spect to all the streets owned by the city,
> "however or whenever acquired, that they
> "shall forever be kept open as public streets,
> "upon faith of which owners of abutting
> "property have, or are presumed to have,
> "acted in improving and building thereon.
> "Can the Legislature abrogate this trust, or
> "authorize its violation without making
> "compensation for any injury sustained by
> "abutting owners? Justice requires a nega-
> "tive answer, and we think it may be proper-
> "ly said that the acceptance and acting upon
> "this trust by owners of abutting property
> "creates in them a right which the law will
> "enforce to have and enjoy the advantages
> "and incidents of a public street, in connec-
> "tion with their property, of which the Leg-
> "islature cannot deprive them without com-
> "pensation."

In the *Fobes* case, 121 N. Y., 505, 518, Peckham, J., referring to the facts, declares in the *Story* case as saying:

> "A plain, palpable and permanent misap-
> "propriation of the street or some portion of
> "it to the exclusive use of the defendant cor-
> "poration, and as resulting from it, the
> "Court held that there was a taking of prop-
> "erty belonging to the plaintiff without com-
> "pensation, which no Legislature could au-
> "thorize or legalize."

In the *Reining* case (128 N. Y., 157, 167), Andrews, J., declared that:

> "The Legislature cannot legally authorize

"structures for railroad purposes to be "erected therein for the use and convenience "of railroads, which practically exclude the "abutting owners from the part of the street "so occupied without compensating them for "the injury suffered."

In Abendroth v. *Manhattan Ry. Co.* (122 N. Y., 1) the Court said:

"An owner of a lot adjoining a city street, "although his title extends only to the side "of the street, and he has no ownership of "the land or interest therein, save as abut- "ting owner, has incorporeal private rights "therein, which are incident to his property, "and which may be so impaired as to entitle "him to damages. Such rights are private "property within the provisions of the State "Constitution (Art. 1, § 6) which forbid the "taking of private property for public use, "without just compensation."

In *Kane* v. *N. Y. Elevated R. R. Co.* (125 N. Y., 165), the Court said:

"The owners of lots abutting on a city "street, the fee of which is in the municipal- "ity, have, by virtue of proximity, special "and peculiar rights, facilities and privi- "leges therein in the nature of easements, "which are not common to the citizens, and "constitute property of which they cannot be "deprived by the Legislature or the munici- "pality, or both, without compensation; and "any use of such street inconsistent with its "use as a public street which interferes with "these easements, is a taking of property, "for which said owners are entitled to com- "pensation to the extent of the damages oc- "casioned thereby."

In *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 N. Y.,

115), the above decisions were approved and applied to a case where under an Act of the Legislature a street in Rochester had been partially closed for the purpose of elevating railroad tracks and the railroad company previous to the time of discontinuing the street had acquired the fee of the same for railroad purposes subject to its use by the general public.

NINTH POINT.

The only pretended justification for the appropriation of plaintiff's easements is the New York Act of 1892.

We are thus brought to the conclusion as stated in the above heading, that the only possible pretense of justification for the taking of the plaintiff's easements, is to be found in the Act of 1892. We have seen how these easements were created; we have seen that they existed and had been enjoyed by her and her predecessors in title for over half a century prior to 1893; and we have seen that a private corporation could not have appropriated them without compensation. The defendants, however, claim that they were justified in this appropriation by Chapter 339 of the Laws of 1892, which they set up in their answer. There is nothing else left of the defense. The condemnation proceedings against the infant Benson, by which defendants acquired the twenty-four foot strip are of no consequence in the case as presented, be-

cause they were allowed by the decision of the trial Court the use of this strip to the fullest extent claimed by them. Neither can they plead the *erection* of the viaduct by the State as a partial defense because there has been no recovery in this case for that erection, nor even for the operation of it, as long as the State assumed any control whatever, namely, for the three years during which the erection was progressing from 1894 to 1897. For the trespasses which the defendants are daily committing upon plaintiff's property their only shield is the State Statute of 1892.

TENTH POINT.

The authority exercised by the Court of Appeals under Chapter 339 of the New York Laws of 1892 to deprive plaintiff of her property without compensation, was repugnant to the Constitution of the United States.

It is not necessary in this case for this Court to decide the question whether the Act of 1892 was or was not unconstitutional. That Act nowhere states that the railroad companies shall be free from the obligation of paying for the easements they have appropriated, and this is pointed out in the Fries case by the able *dissenting opinion* of Judge Cullen. This writ of error is granted under the Act of Congress which provides for a review, where either the statute *or the authority* exercised thereunder is repugnant to the Constitu-

tion of the United States. And the record in the Court of Appeals shows that that was the question raised before it, for it reads: "That in the said "suit or action there was drawn in question the "validity of Chapter 339 of the laws of 1892 and "the acts amendatory thereof *and of the authority "exercised thereunder* on the ground of their be- "ing repugnant to the Constitution of the United "States."

The statute provided for the erection of an elevated railroad. The Supreme Court of the State of New York held that plaintiff was entitled to compensation for the property taken in the construction of the road. The Court of Appeals held otherwise, and that because the State had commanded the erection, plaintiff was not entitled to such compensation. It is this *decision of the Court of Appeals* that we seek to have reversed. It is that *authority exercised under that Act* that we seek to have overruled in this case.

This authority was exercised in a manner violative or repugnant to the Constitution, because it took plaintiff's property without the opportunity for a hearing or any pretense of such an opportunity.

Notice of hearing or an opportunity to be heard are necessary elements of due process of law.

Roller v. Holly, 176 U. S., 398, 409.
Carson v. Brockton Sewerage S., 182 U. S., 398, 401.

Due process of law also included provision for compensation for property taken.

Chicago, Etc., R. Co. v. Chicago, 166 U. S., 226, 236, 241.

Tindal v. Wesley, 167 U. S., 204, 222, 223.
Holden v. Hardy, 169 U. S., 366, 390-1.
Norwood v. Baker, 172 U. S., 269, 277.

Further, it is to be said that the prohibition in the Fourteenth Amendment applies to all instrumentalities of the State, its legislative, executive and judicial authorities.

Chicago, Etc., R. C. v. Chicago, 166 U. S., 226, 233, 234.
Scott v. McNeal, 154 U. S., 34, 35.

The legislature has no power to abrogate the trust created by the dedication of land for public purposes except upon making compensation.

Railroad Co. v. Schurmeir, 7 Wall (U. S.), 272, 289, 290.
U. S. v. Ill. Central R. Co., 2 Biss. (U. S.), 174, 181.
Packet Co. v. Sorrels, 50 Ark., 466, 473.
Canastota Knife Co. v. Newington Tramway Co., 69 Conn., 146, 172.
City of Jacksonville v. Jacksonville R. Co., 67 Ill., 540, 543.
City of Chicago v. Ward, 169 Ill., 392, 412.
Warren v. The Mayor, 22 Iowa, 351, 356.
Franklin Co. v. Lathrop, 9 Kan., 453, 463.

Schurmeir v. St. Paul R. Co., 10 Minn., 82, 105. Affd. 7 Wall (U. S.), 272.

City of St. Paul v. Chicago R. Co., 63 Minn., 330, 352.

Belcher Sugar Ref. Co. v. St. Louis Co., 82 Mo., 121, 125-6.

Cummings v. St. Louis, 90 Mo., 259, 263-4.

City v. Laverack, 34 N. J. L., 201.

Trustees v. Mayor, 19 N. J. Eq., 355, 357.

Methodist Episcopal Church v. Penn. R. Co., 48 N. J. Eq., 452.

LeClercq v. Gallipolis, 7 Ohio, 217.

Board of Education v. Edson, 18 Ohio St., 221, 225.

Portland R. Co. v. City of Portland, 14 Oregon, 188, 197.

Lamar Co. v. Clements, 49 Texas, 348.

Penn. v. Wheeling Bridge Co., 13 How. (U. S.), 518.

Bridge Proprietors v. Hoboken Co., 1 Wall (U. S.), 116, 144-5.

The Binghamton Bridge, 3 Wall (U. S.), 51.

Finally, the proposition at the head of this point has been finally and conclusively decided as there stated by this Court in the Muhlker case (April 10, 1905).

ELEVENTH POINT.

The constitutional provisions for the protection of property and contracts should be liberally and faithfully enforced.

This is a flagrant instance of a violation of property and contract rights. The defendants, under pretended color of authority by the legislature, entered on a public street and appropriated and destroyed valuable property belonging to scores of private individuals, bringing them in many cases to the verge of ruin. The facts were notorious, and were, moreover, proven convincingly in the Courts and before judges having full knowledge of the local situation. A dozen different Supreme Court Justices of the highest character and familiar with the locality, found the facts as the property owners claimed, and gave solemn judgment that they had actually suffered the grievances they complained of, and were entitled to redress in damages. The State Court of Appeals, following a line of unbroken decisions, affirmed the principle and the judgment in the first case before it. And then, at last, the same Court of Appeals, by a bare majority vote, reversing itself, tells the injured property owners and contract owners, that they have no right to demand any redress or compensation whatever; that the State law has abrogated the contract on which they relied, and has decreed that property which they and their predecessors have possessed for half a century shall be taken from them without compensation. Now when they come here, they are told by the defendants' learned

counsel that as the State Court must be supposed to have decided justly, therefore the presumption is conclusive that these plaintiffs never had any property or contract rights of which they could be deprived. In the State Courts plaintiffs are told, yes, the defendants have taken your property, but they did it by command of the State, and you have no redress; and when they appeal to this Court and ask if that is really the law, then they are told by the same defendants at this Bar that they never had any easements and were never deprived of any, and when, in reply, they turn to the record and the findings of the Court, showing that they actually had this property, and that they lost it, and what damages they have sustained, and what the evidence shows, and what the State Courts themselves found and decided to be the fact, they are answered that this Court must not examine the findings, but must assume that the New York Court of Appeals did exactly the contrary of what it actually did, and what it said it did, and what it openly claimed it did when it decided these cases. Justice would indeed be blind if such a plea could be successful.

If whenever the action of the State authorities is brought here for review upon a claim that they have taken property without compensation, it is to be a sufficient answer that there is a conclusive presumption of law that the State authorities did right, and that there was in fact no property to be paid for notwithstanding the facts and notwithstanding the findings of the State Courts themselves, then the right of review in such cases and the constitutional safeguard are practically valueless.

The true rule requires and plain justice re-

quires this court to look into the record and see what the facts are as found by the court below and as they appear uncontradicted upon the record and acting upon those facts, to give contracts and property rights the protection which the Constitution guarantees.

In *Murray* v. *Charleston*, 96 U. S., 432, 448, it was said: "There is no more important provision "in the federal constitution than the one which "prohibits States from passing laws impairing "the obligation of contracts, and it is one of the "highest duties of this Court to take care that "the prohibition shall neither be evaded nor frit-"tered away. Complete effect must be given to it "in all its spirit. The inviolability of contracts, "and the duty of performing them as made, are "foundations of all well ordered society and to "prevent the removal or disturbance of these "foundations, are one of the great objects for "which the Constitution was framed."

TWELFTH POINT.

The judgment entered upon the decision of the New York Court of Appeals should be reversed.

ALFRED B. CRUIKSHANK,
Of Counsel for plaintiff in error.

INDEX.

NOTE.—The "Supp. to Brief," quoted within, is the pamphlet entitled "Legislative Enactments and Judicial Opinions."

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Supreme Court of the United States.

ALICE I. BIRRELL,
Plaintiff-in-Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY

and

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants-in-Error.

October Term, 1904. No. 202.

BRIEF FOR DEFENDANTS-IN-ERROR.

Statement of Facts.

This is a proceeding by writ of error to the Supreme Court of the State of New York, allowed by his Honor, Chief Judge Alton B. Parker (page 73), to review a final judgment of and rendered and entered by that court at a Special Term thereof, dated March 31, 1903 (page 66), upon and in conformity with the remittitur of the Court of Appeals (page 1), dismissing the complaint of the plaintiff upon the merits.

THE COMPLAINT.

The action was commenced January 27, 1897 (page 2) and plaintiff Birrell in and by her complaint therein (page 3) alleged ownership since September 14, 1893, of

therein described premises, situate at the northeasterly corner of Park Avenue and 123d Street, having a width of 35 feet on the street and a depth of 100 feet 11 inches upon the avenue; that the avenue is, and has been, since prior to 1870, a public street established by proceedings under Chapter 86 of the Laws of 1813 and amending acts; that she, as appurtenant to her said premises, has rights and easements therein; that defendant Harlem Company is the owner, and Central Company is, and since April, 1873, has been the lessee of the described railroad and railroad structures which were operated by steam by the Harlem Company prior to 1873, and by the Central Company since that time; that subsequent to said lease defendants, without right or authority as against plaintiff or her predecessors in title, excavated in Park Avenue in front of said premises, and constructed in the cut or depression thus formed, with masonry walls extending above the surface of the avenue, the railroad which they have maintained and operated by steam engines for more than six years last past; that on or about April, 1893, defendants commenced, and have since continued, the construction of a permanent elevated railway structure supported by columns of iron and steel standing on pedestals of masonry imbedded in the soil of said avenue; that this structure substantially and materially interferes with and impairs the easements of light, air and access appurtenant to said premises; that the maintenance and use of this structure constitutes a trespass upon plaintiff's said easements, which will be constant and continuous; that the said acts of defendants have been, are and will be without warrant of law, without her consent, and that to prevent multiplicity of suits she invokes the equitable interference of the Court, and prays damages for the trespasses committed and an injunction restraining the further maintenance and operation of the elevated road in front of her premises.

The Answer.

The answers of the defendant railroad companies (page 6), *inter alia*, denied that they had built, or were building, or intended to add to or complete the elevated railroad structure; admitted ownership and lease of and previous maintenance and operation of the railroad and the purpose and intent to operate it on the elevated structure upon its completion; and further alleged:

That pursuant to the act of 1807, a map or plan of public streets was filed April 1, 1811, exhibiting Fourth avenue of the width of one hundred feet. That by the act of 1831 the N. Y. & Harlem R.R. Co. was incorporated to construct a railroad within the bounds and between the termini named, and in pursuance thereof located its road and made and duly filed a survey and map thereof, which, by resolution of October 22, 1831, was duly approved by the proper city authorities, which road, as located, occupied a twenty-four foot strip of land having its center line coincident with the center line of Fourth avenue, as exhibited on said city map.

That by ordinance of December, 1831, the city council granted permission for the building of the road upon conditions w hich were agreed to by and between the city and the railroad company of date January 9, 1832. That thereafter the railroad company acquired title to the said twenty-four foot strip of land extending from Harlem river to Forty-second street, including that in front of plaintiff's described premises, with the power of sloping embankments or excavations the full width of the avenue, and many years prior to the city's acquirement of title to avenue the railroad company had its road constructed and in operation upon the said strip of land and so continued until the changes required by the acts of 1867 and 1872, respectively, were successively made. That by reason of the existence of the railroad, and in pursuance of the

memorial of the Mayor, etc., the act of 1837 was passed altering the city map by adding twenty feet upon either side of this avenue.

That the railroad company's acquirement of its said title and building of its road was many years prior to plaintiff's acquirement of title, if she has any, to the premises described, all in pursuance of said act of incorporation and with the acquiescence of plaintiff's predecessors in title. That in pursuance of the act of 1848 the New York and New Haven (now New York, New Haven and Hartford) Railroad Company in that year acquired *from the Harlem Company* the right to run its trains over this portion of said railroad, which it has ever since done and is now doing. That by proceedings instituted in 1850 under and in pursuance of and subject to all of the acts, ordinances and agreements relating to the said Fourth avenue, and to the said railroad therein and resulting in an order of confirmation entered in October, 1853, the city of New York assumed to acquire title to the land within the lines of said avenue, from Thirty-eighth street to the Harlem river, subject, nevertheless, to the right of the Harlem Company, its successors and assigns, to maintain and operate its said railroad therein conformable to lawful public regulation. That by the act of 1872, as and by way of eliminating grade crossings and otherwise improving the avenue, a prescribed statutory grade of the railroad from Forty-fifth street to the Harlem river was provided and established, and provision made for viaducts and over and under crossings, all whereof was carried out and maintained and used thenceforth, and still is. That in April, 1873, the railroad was leased to the Central Company, which entered thereunder, and is now in sole possession thereof. That on April 19, 1892, the Legislature passed an Act entitled "An Act to regulate, improve and enlarge Park Avenue above 106th Street," etc., known as Chapter 339 of the Laws of 1892,

and which act has been duly amended by Chapter 548 of the Laws of 1894, Chapter 594 of the Laws of 1896, and Chapter 613 of the Laws of 1898.

That under and pursuant to section 13 of the Act of 1892 the board therein designated was appointed and organized and thereupon took entire charge of and proceeded in the execution of the work prescribed by said act, and in that behalf made sundry contracts whereunder all requisite structures, both permanent and temporary, have been and are being constructed under the sole supervision of said board and in part at the expense of the city of New York and thereby the provisions of the said act have been carried out and executed.

That all the said changes that have been made were necessary to carry out the provisions of the said acts and necessary to carry into effect the therein prescribed enlargement and improvement of the avenue.

Also pleaded the statutes of limitations and *adverse possession* for a period of more than twenty years (pp. 6-13).

The Trial.

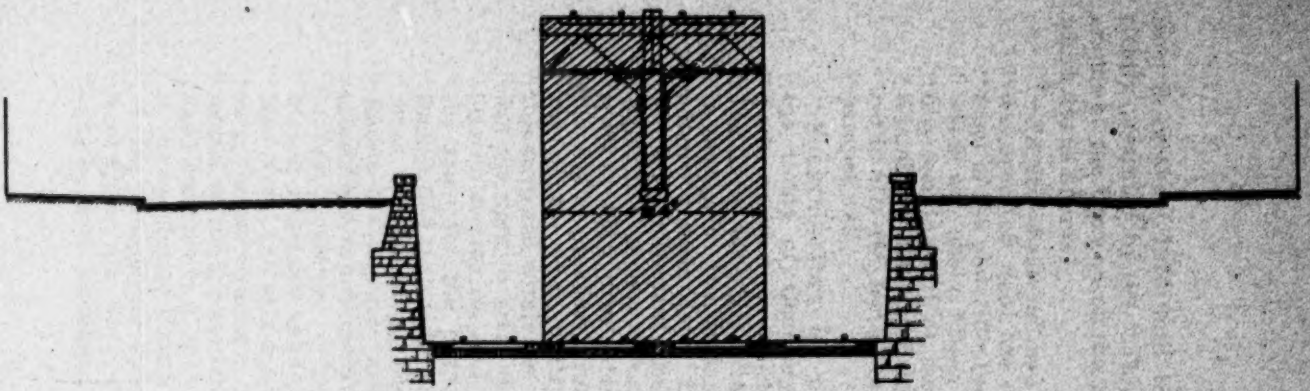
Upon the trial of the issues thus joined plaintiff gave evidence (pages 21–39), tending to prove her title to the described premises, and the measure of damages to the usable and fee value thereof claimed by her to be ascribable to the maintenance and use of the railroad structure and train operation; and defendants gave evidence (pages 41–49), tending to prove the public and private consents, agreements, grants, condemnation proceedings and users as alleged in their said answer, under all of which they claimed the right as against plaintiff to possess and use the previously and then existing railroad structures and to maintain their train operations thereon.

The proofs as to the title of the parties respectively and of the character of railroad structure maintained and used

from in or about 1872 until 1897 are, in the main, sufficiently presented by the "Third" and "Fourth" paragraphs of the decision of the trial court (pages 15, 16), which are as follows:

"THIRD.—Said railroad prior to August, 1894, "was operated along the centre of said avenue, in "front of the plaintiff's premises, in a depressed cut, "which was about fifteen feet in depth and about "fifty feet in width at the bottom, with a slope of "retaining walls, which increased the width of the "cut to fifty-two feet at the top, surmounted with a "parapet wall.

"FOURTH.—That by proceedings duly had in "the Court of Chancery of the State of New "York, entitled, In the Matter of the Petition of "The New York and Harlem Railroad Company, "in relation to certain lands, &c., and by a decree "entered therein dated December 28th, 1832, the "the said defendant The New York and Harlem "Railroad Company, became the owner in fee of a "strip of land twenty-four feet wide in front of "plaintiff's premises, running north and south "through the centre of Park Avenue, and that upon "this strip and within its boundaries the defendant "had the right to erect the viaduct structure as at "present erected on said Park Avenue, and to use "the same for the purpose of a railroad, and I "further find that under and by virtue of the char-"ter of the defendant, The New York and Harlem "Railroad Company, and the acts amendatory "thereof and supplemental thereto, the various reso-"lutions, consents, ordinances and acts of the "Mayor, Aldermen and Commonalty of the City of "New York, the said decree of the Court of Chan-"cery, the proceedings in the Supreme Court in the "matter of the application of the Mayor, Aldermen "and Commonalty of the City of New York relative "to the opening of Fourth Avenue; the various acts "of the Legislature upon which said proceedings "were taken; also Chapter 702 of the Laws of 1872, "and the acts performed by the defendants there-



SECTION OF PARK AVENUE
Across north line of 123rd. Street,
showing extent of defendant's rights,
as found by the Trial Court.
(see fourth finding, page 16 of record.)

"under, the lease of the New York and Harlem "Railroad Company to the New York Central and "Hudson River Railroad Company, dated April 1st, "1873, and all acts of acceptance, user and occupa- "tion on the part of the defendant railroad com- "panies, and the lapse of time and the acquiescence "of the plaintiff or her predecessors in title, the said "defendant railroad companies acquired the right "without liability to the plaintiff to have, maintain "and use their railroad and railroad structures over "the remainder of said bed or roadway of fifty feet "or thereabouts, as the same were maintained and "used prior to August, 1894, as hereinbefore de- "scribed."

[See opposite page.]

The judgment directed and entered (page 18) was, that the plaintiff recover the sum of $3,360 damages, and the interest thereon and costs, amounting in the aggregate to $4.483.85, and "that the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of said viaduct structure and railroad in front of the plaintiff's premises north-east corner of Park Avenue and 123d Street outside of the 24-foot strip in the center of said avenue" etc., unless they pay to plaintiff $7,050 for a grant or release of the easements appropriated.

The plaintiff did not except to the above decision nor appeal from the judgment, and hence in so far as the findings of the trial court are adverse to her contention, they are binding upon her.

The defendants appealed and upon the review of the judgment in the Supreme Court, Appellate Division, the judgment was in all things affirmed, but by a divided court (page 63), and from this the defendants appealed to the Court of Appeals, with the result that the latter court ordered and adjudged reversal of the judgment and dismissal of the plaintiff's complaint on the merits and re-

mitted the case to the Supreme Court, wherein judgment was entered accordingly on the said *remittitur*.

[See opposite page.]

The matters relied upon for the proceeding in this court appear in and by the *remittitur* as aforesaid issued by the Court of Appeals to the Supreme Court (page 1), to wit:

"That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to Section 1 of Article 14 and the amendments thereto, and of Section 10 of Article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

The Title.

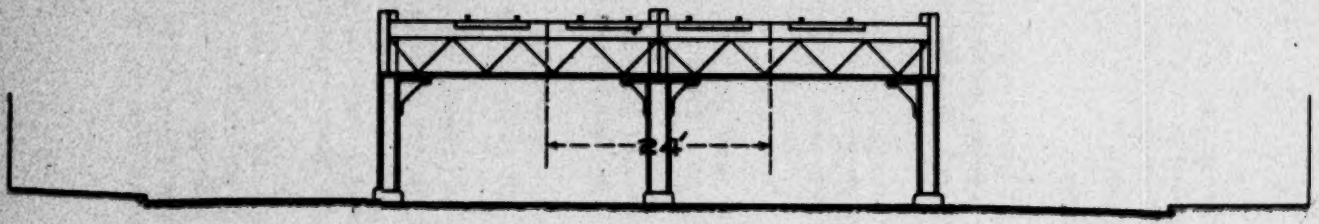
This case differs from the *Muhlker* case in the following particulars:

On the sixteenth of June, 1893, one Moore acquired title to the premises in question, and on the thirteenth of September, 1893, he deeded the premises to the plaintiff in error.

It does not appear that any conveyance of the premises had been made between 1881 and 16th June, 1893.

The law which is to be read into the plaintiff in error's contract, therefore, is the law as it stood on the 16th of June, 1893.

This was, of course, long after the decisions in the *Story* and *Lahr* cases, but it *was* also after the decisions



SECTION OF PARK AVENUE
Across the north line of 123 rd. Street,
showing extent of defendant's rights,
as found by the Court of Appeals.
(see fourth finding page 16 of record.)

of *all* of the following cases which are to be read into the plaintiff in error's contract. The list is as follows:

People *v.* Kerr, June, 1868, 27 N. Y., 188.

Story *v.* N. Y. El. R.R. Co. Argued June 7, 1882; decided October 17, 1882, 90 N. Y., 122, 124.

Lahr *v.* Met. El. R.R. Co. Argued October 27, 1886; decided February 1, 1887, 104 N. Y., 268, 270.

Fobes *v.* R. W. & O. R.R. Co. Argued April 16, 1890; decided June 10, 1890, 121 N. Y., 505, 506.

A. B. N. Co. *v.* N. Y. El. R.R. Co. Argued October 14, 1891; decided December 1, 1892, 129 N. Y., 252, 255.

Bohm *v.* Met. El. R.R. Co. Argued December 8, 1891; decided January 20, 1892, 129 N. Y., 576.

Bischoff *v.* N. Y. El. R. Co. Argued April 5, 1893; decided May 5, 1893, 138 N. Y., 257, 258.

And also—

1892, April 19—the Act of 1892 had been passed—and had the construction under it, [illegible],

1893—April (R., 5).

Actually begun—

So that both Moore and the plaintiff in error bought *with full knowledge of what was to be the physical condition of things*—whatever that may amount to.

THE STRUCTURE.

The changes there made were these—

The old structure had been a depression, or cut, about fifteen feet deep—the width of the whole being about 52 feet. The *change* was to fill up the cut, restore the whole

street to its grade, and build an elevated structure about ~~50 feet in width, of less width than the whole of the old construction but~~ some 21 [redacted] feet above the surface. This, of course, *restored the whole of the street for the purposes of access and use*, except what small parts were occupied by the supporting columns.

The Harlem Company owned the fee of the centre 24 feet—and, as the trial court found, had the right, upon that 24 feet, to build or maintain a structure as high as the present one—which is, of course, equivalent to holding that it could build one of that width still higher—and solid.

The trial court also found that the new "permanent "street use and the operation of trains thereon *outside of* "*the twenty-four foot strip*, were a continuous trespass "upon plaintiff's easements *of light and air* appurtenant "to said premises." The recovery thus being, as it has been in all the other cases, restricted to the lessening of the value of the premises by reason of the obstruction *of light and air only*—not anything for its lessening in value by reason of noise or cinders or vibration—or any of the other inconveniences *which would come from the running of the railroad*—but restricted to the want of *light and air* which would be caused solely by the *structure* (R., 25–26).

The plaintiff in error did *not* appeal from the judgment —and thus all of these holdings are binding upon her.

The Acts of 1892 and 1901.

On the 19th of April, 1892, the Harlem Company was in full life and being, and of the age of something more than sixty years. The New York Central and Hudson River Railroad Company was also in full life and being, and of the age of something more than twenty years. During all their lives it had been *one of the conditions of existence* for both of them that when, for any necessary purpose, they took any "real property" belonging to anyone, they must pay for it—and pay for it *before the taking*. By the 19th April, 1892, these provisions had become embodied in the Railroad Law of the State (Chap. 565, Laws 1890), and the Code of Civil Procedure of the State (Chap. 448, Laws 1876). As then existing these provisions were, and still are, as follows:—

Railroad Law of New York.

"ACQUISITION OF TITLE TO REAL PROPERTY.

"§ 7. All real property, *required by any railroad corporation for the purpose of its incorporation*, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or *of any* right, interest or *easement therein*, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, *it shall have the right to acquire title thereto by condemnation*. It shall also have such right in the following cases:

"1. Where title to real property has been acquired, or attempted to be acquired, and has been found to be invalid or defective.

"2. Where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating such railroad.

"3. Where it shall require *any further rights to lands or the use of lands* for switches, turnouts or for filling

" any structures of its road, or for constructing, widen-
" ing or completing any of its embankments or roadbeds,
" by means of which greater safety or permanency may
" be secured, and such lands shall be contiguous to such
" railroad and reasonably accessible to the place where
" the same are to be used for such purpose or purposes.

" 4. Where it shall require any further right to lands
" or to the use of lands for the flow of water occasioned
" by railroad embankments or structures now in use, or
" hereafter rendered necessary, *or for any other purpose*
" *necessary for the operation of such railroad*, or for
" any right to take and convey water from any spring,
" pond, creek or river to such railroad, for the uses and
" purposes thereof, together with the right to build or
" lay aqueducts or pipes for the purpose of conveying
" such water, and to take up, relay and repair the same,
" or for any right of way required for carrying away or
" diverting any water, stream or floods from such rail-
" road for the purpose of protecting its road *or for the*
" *purpose of preventing any embankment, excavation or*
" *structure of such railroad from injuring the property*
" *of any person who may be rendered liable to injury*
" *thereby.*

" Waters commonly used for domestic, agricultural or
" manufacturing purposes shall not be taken by condem-
" nation to such an extent as to injuriously interfere with
" such use in future. No railroad corporation shall have
" the right to acquire by condemnation any right or ease-
" ment in or to any real property owned or occupied by
" any other railroad corporation, except the right to
" intersect or cross the tracks and lands owned or held
" for right of way by such other corporation, without
" appropriating or affecting any lands owned or held for
" depots or gravel-beds."

Code of Civil Procedure.

" Sec. 3359. WHEN PROCEEDINGS PRESCRIBED IN THIS TITLE TO BE TAKEN.

" Whenever any person is authorized to acquire title to
" real property, for a public use *by condemnation*, the pro-
" ceeding for that purpose shall be taken in the manner
" prescribed in this title."

By sections 3360 to 3374 inclusive "the manner prescribed in this title" is detailed, and is a regular action in the Supreme Court—the only court of *general* jurisdiction in New York, and ending in a judgment.

By Sec. 3375 possession of the property taken can only be had after payment of the compensation awarded by the judgment.

Always as long as those two corporations had lived the *lines* of their railroads had been prescribed *by law* and from time to time changed by *law*. As originally made, those lines must, of course, have passed entirely upon the lands of *other people*—lands not their own—but which they were bound as one of the conditions of their existence to *take* and *pay for*—*pay* for *before* the taking and at the end of a *regular* proceeding—in a *regular* court of *full* jurisdiction into which the owner of the thing taken was regularly brought.

In this condition of things the Act of 1892 was passed. This act, so far as those two companies were concerned, *changed* a portion of their line and required them to run upon a new line—*partly, at any rate, then the property of others.*

By it the State built an elevated structure, which it paid for itself, getting the money for it by its power of taxation, one half from the defendants and the other half from the city of New York; and it commanded and compelled the defendants to put their railroad upon it and run it there, instead of where it had been before. That this was not in the interest of the defendants, but solely in the interest of the public, was held by the Court of Appeals, and is shown by this, that the command of the Congress to have the bridge over the Harlem River raised, required the change of the former line from 129th Street to the north, *but no other change.* What the act did, however, was to give a much worse railroad line than before. The railroad was required to ascend from 106th Street to

116th Street (one-half mile) at the rate of 40 feet to the mile, and then to *descend* from 116th Street to 129th Street (rather more than a one-half mile), at the rate of 29.6 feet per mile. In other words, the net result to the railroad companies was that they had to pay something like a million of dollars *for the privilege of climbing over a bad hill.* (Section 1, Act 1892; Supp. to Brief, 16.)

The State built the structure and, as has already been said, by its power of taxation it collected the money which the building of it cost, one-half from the railroad companies and the other half from the city of New York.

The railroad companies, as they were commanded by that act to do, put their railroad upon the top of it, and have been running it there since. If they had not obeyed the command, they could not only not have got to their station in the city of New York, but their lives could have been ended.

Certain suits were then brought against them, this one among others; were determined in the Supreme Court of New York in favor of the respective plaintiffs, and went to the court of appeals.

On the eleventh of May, 1901, New York, by her legislature, passed an act which is chapter 729 of her laws of that year, and which will now be copied.

At that time there were before the court of appeals of New York cases, like this one—the *Welde* and *Fries* cases. In the following October those cases were decided against *Welde* and *Fries*, reversing the judgments below, and dismissing the action. (Supp. to Brief, 92, 97.)

We now give the act of 1901.

ACT OF 1901.

CHAP. 729.

"AN ACT conferring jurisdiction upon the court of claims
" to hear, audit, and determine the alleged claims of
" certain owners of real property in New York city
" for damages alleged to have been caused to said
" property by the operations carried out pursuant to
" chapter three hundred and thirty-nine of the laws
" of eighteen hundred and ninety-two.

Became a law, May 11, 1901, with the approval of the Governor. Passed, three-fifths being present.

"The People of the State of New York, represented in " Senate and Assembly, do enact as follows:

"SECTION 1. Jurisdiction is hereby conferred upon the " court of claims to hear, audit, and determine the alleged " *claims* of persons who now own or heretofore have owned " *real property abutting on Park avenue*, in the Borough " of Manhattan, city of New York, between One Hundred " and Sixth street and the Harlem river, or the heirs, ex- " ecutors, administrators, or assigns of said persons, *for* " *damages* alleged to have been *caused to said property by* " *the acts and operations performed and carried out*, pur- " suant to chapter three hundred and thirty-nine of the " laws of eighteen hundred and ninety-two, and the acts " amendatory thereof and supplemental thereto, *in so far* " *as said acts and operations were performed or carried* " *out by, or under the direction or superintendence of, the* "*public board created by said act*, namely, the board for " the Park avenue improvement above One Hundred and " Sixth street, and the court of claims is authorized to " make awards and to render judgments therefor against " the state and in favor of said claimants; provided, how- " ever, that this act shall not be construed as conferring " upon the court of claims jurisdiction to award *any dam-* " *ages for which any railroad corporation or corpora-* " *tions may, either at law or in equity, be liable.*

"SECTION 2. No award shall be made or judgment ren- " dered herein against the state unless the facts proved " shall make out a case against the state, which would

"create a liability were the same established in evidence "in a court of law or equity against an individual or cor- "poration; and in case such liability shall be satisfactorily "established, then the court of claims shall award to the "claimants such sums as shall be just and equitable, and "shall render judgments for the same, notwithstanding "the lapse of time since the accruing of damages, pro- "vided the said claims are filed with the court of claims "within one year after the passage of this act.

"SECTION 3. This act shall take effect immediately."

In the following year the *Muhlker* case was decided, and the court of appeals of New York speaking by its Chief Judge, then said (Supp. to Brief, 102): "Undoubt- "edly the state had also the power to provide in the act "for compensation to abutting owners, and to apportion "the expense incurred in the acquisition of the easements "destroyed upon the defendants and the city of New "York, as it apportioned the expenses of building the "viaduct and making the other changes in the street; "and it still has the power to authorize ascertainment of "the damages to the abutting owners through its Court of "Claims and to provide for their payment, *and it may* "*well be that it would be equitable for it to do so.*"

It is to be observed that under those acts the court of appeals of New York held the defendants liable for all obstructions to light and air by the building of *stations* (*Dolan* case, Supp. to Brief, 122).

THE FEDERAL QUESTIONS.

The plaintiff in error contended in the court of appeals of New York that the act of 1892 "*and the authority* "*exercised thereunder*" were repugnant to the Constitution (R. 1.)

FIRST POINT.

The Act of 1892 is not repugnant to the Constitution.

It is to be observed that the Court, in its opinion in the *Muhlker* case, has not *said* that the act of 1892 was repugnant to the Constitution. The opinion does not discuss that matter at all.

In the court of appeals of New York both dissenting judges agreed that the act was constitutional (Supp. to Brief, 109, 116), Judge Cullen saying: "The statute " would simply be inoperative until the company acquired " the necessary land."

I.

The act does not *forbid* compensation nor the giving of notice to the plaintiff.

It does not repeal the Railroad Law. If it did, the effect would be only to revive the old charters of the two companies, which contain the same commands for compensation and notice, with a statement that the act does *not* provide for compensation, *and* does *not* provide for notice—the appropriate answer to both of which statements is to *deny the fact*, and then they devote about 50 pages of print each to showing that plaintiffs have an easement.

Plaintiff's brief Court

Read together with the Railroad Law and the Code of Civil Procedure of New York it not only provides for, but *compels* compensation for the taking of any "easement," and ample notice for the fixing of that compensation.

Read in connection with the law of 1901 it gives payment, *from the treasury of the state*, for all *damages* caused to abutting property by the "acts and operations" of the board created by that act.

The word damages, as the Court has held in *Chicago* v. *Taylor* (125 U. S., 161), and several times since, means the

lessening of the value of the abutting property, which is much more than the plaintiff in error gets by the judgment below, *because* he gets only the lessening of value caused by the loss of *light* and *air*, in other words, *nothing for the running of the trains.*

We challenge counsel to put together ANY *words* which will better give compensation or better give notice.

The act of 1892 was, we submit, certainly not repugnant to *any* part of the Constitution.

And counsel seem to apprehend that condition of things, for ~~they~~, in their brief, they rely, not so much upon the *act* being repugnant to the Constitution, but upon the authority "exercised thereunder" being repugnant to the Constitution.

The phrase of the Constitution is this: No state shall "*pass* any *law* * * * impairing the obligation of con-
"tracts."

It is plain that the act of 1892, read in connection with the railroad law; the code of civil procedure and the act of 1901, does *not* impair the "obligation" of any "contract," and, of course, no "authority exercised thereunder" can do so.

That is not the question, although that is the only question which they can raise, *since that is the only question which they raised below.*

The question, as we understand it, is this:

There is a dispute between two beings—human or artificial, it does not matter—about the ownership of a piece of land, or a trespass upon a piece of land. The common law, of course, requires the being in possession of the piece of land to give it up to the true *owner*, and the being who committed the trespass to pay for it to the *owner;* but of course the person who *claims* to be owner, must show that he *is* the *owner*. And thus arises a controversy as to the ownership of the land; but that controversy can never, we submit, come to the Court.

Suppose, now, that a state makes a statute simply declaratory of the common law in this respect. That statute is certainly *not* repugnant to the Constitution. *But does it bring every dispute as to ownership of land to the Court?* Is every railroad act, general and special, repugnant to the Constitution, because there may be a dispute between the railroad company and someone else as to which of them owns a piece of land? Such disputes are common enough. Of course this is a holding either that the Railroad Law of New York *and about every railroad charter in the country is repugnant to the Constitution and void.*

In that event, of course, the plaintiff cannot recover anything but damages for the trespass. The act being void, the railroad companies cannot use the right of eminent domain to take the easements and land necessary for the structure, and consequently the plaintiff cannot recover for their permanent appropriation.

What the Court has just held in the *Muhlker* case is, as we respectfully submit, *not* that the act of 1892 was repugnant to the Constitution, but that the *decision of the court of appeals of New York was repugnant to the constitution.*

Of course there is not any such question here, since no such question was raised below.

SECOND POINT.

A change of judicial decision is not the passage of a law impairing the obligation of a a contract, within the meaning of those words as used in the Constitution.

In Yazoo and Mississippi Railroad Company *v.* Adams, 180 U. S., 41, the Court, speaking by Mr. Justice Brown, said:

(p. 44.) "There is no doubt of the general proposition "that, where a contract is alleged to have been impaired "by subsequent legislation, this court will put its own "construction upon the contract, though it may differ "from that of the Supreme Court of the state. The authori- "ties upon this point are very numerous, but they all "belong to a class of cases in which it was averred that, "properly construed, the contract was impaired by sub- "sequent legislation; but, if the sole question be whether "the Supreme Court has properly interpreted the con- "tract, *and there be no question of subsequent legislative* "*impairment*, there is no Federal question to be answered. "*Lehigh Water Co.* v. *Easton*, 121 U. S., 388.

"To sustain our jurisdiction under the second clause of "Rev. Stat., sec. 709, relied upon here, there must be "drawn in question the validity of a state statute upon "the ground of its being repugnant to the Constitution "or laws of the United States; but of what state statute "is the validity attacked in this case? None is pointed "out in the record; none set up in the pleas; none men- "tioned in the opinion of the court."

And at page 46: "Three recent cases in this court are "pertinent in this connection. In *Central Land Co.* vs. "*Laidley*, 159 U. S., 103, an action of ejectment was "brought by Laidley against the land company in a court "of West Virginia. The case turned upon the defective-

"ness of a wife's acknowledgment to a deed of land. The "Court of Appeals of Virginia, prior to the organization of "the State of West Virginia, had in several cases held that "acknowledgments in this form were sufficient; but the "Court of Appeals of West Virginia in this case held it to "be insufficient, and the change of the settled construction "of the statute was charged as an impairment of the con- "tract. This court held that under the contract clause of "the Constitution, not only must obligation of the con- "tract be impaired, but it must have been impaired "*by some act of the legislative power of the State, and* "*not by decisions of the judicial department only.*"

In this same case of *Central Land Company* v. *Laidley* (159 U. S., 103), the Court said (p. 110, 111):

"The same doctrine was stated by Mr. Justice Harlan, "speaking for this court, as follows: 'The state court may "erroneously determine questions arising under a contract "which constitutes the basis of the suit before it; it may "hold a contract void which, in our opinion, is valid; it may "adjudge a contract to be valid which in our opinion is "void; or its interpretation of the contract may, in our "opinion, be radically wrong; but, in neither of such cases, "would the judgment be reviewable by this court under "the clause of the Constitution protecting the obligation "of contracts against impairment by state legislation, and "under the existing statutes defining and regulating its "jurisdiction, *unless that judgment, in terms or by its* "*necessary operation, gives effect to some provision of the* "*state constitution, or some legislative enactment of the* "*State* which is claimed by the unsuccessful party to im- "pair the obligation of the particular contract in ques- "tion.' *Lehigh Water Co. v. Easton*, 121 U. S., 388, 392.

"Many other decisions of this court to the same effect "are cited in that case. See also *New Orleans Waterworks* "*v. Louisiana Sugar Co.*, 125 U.S., 18, 30; *St. Paul &c.*,

"*Railway v. Todd County*, 142 U. S., 282; *Brown v.* " *Smart*, 145 U. S., 452; *Wood v. Brady*, 150 U. S., 18."

And in the same case, is also said:

Page 110:

" It was said by Mr. Justice Miller, in delivering a " later judgment of this court: ' We are not authorized " ' by the Judiciary Act to review the judgments of the " ' state courts because their judgments refuse to give " ' effect to valid contracts, or because those judgments, " ' in their effect, impair the obligation of contracts. If " ' we did, every case decided in a state court could be " ' brought here, where the party setting up a con- " ' tract alleged that the court had taken a different view " ' of its obligation to that which he held.'" *Knox* v. *Exchange Bank*, 12 Wall., 379, 383.

THIRD POINT.

The question of the construction of the contract is, therefore, not in the case.

The Court takes jurisdiction of the matter of the construction of the contract, solely to determine whether the statute in question "impairs its obligation" (*Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443). But here is a case where it does not make any difference *which way the contract is construed*, because the statute is not repugnant to the Constitution *in either event*. If the construction is in the *favor* of the plaintiff in error *the statute pays him*. If it be against him, of course he is also paid for whatever he has.

We submit that until the statute is held to be repugnant to the Constitution, there is no question as to what the contract means.

In this case, as we submit, the result is as follows:

The Court takes jurisdiction because of the claim that the Act of 1892 is repugnant to the Constitution. The Court *admits*, in its opinion, by not asserting the contrary and by *not* at all discussing the question *that the Act of 1892 is* NOT *repugnant to the Constitution.*

Nevertheless, it reverses the judgment, upon a question of which, if the Act of 1892 be constitutional, it has no jurisdiction.

See the consequences. Anybody who wants to make a claim against any railroad company simply alleges that the *Railroad Law* is repugnant to the constitution—and upon that allegation brings the case here to the Court. Of course, the Court immediately determines that the Railroad Law is not repugnant to the constitution. Nevertheless it decides the case and reverses the judgment, upon the matter of the simple claim for money.

FOURTH POINT.

Upon the construction of the Acts of 1892 and 1901, read together with the Railroad Law and the Code, the decision of the Court of Appeals of New York is conclusive and will be followed by the Court.

By the Act of 1901, the State is to pay, *provided* the railroad companies are *not* liable. The plaintiff gets his money in any event.

Upon that question as to *which, under New York's own statutes,* PAYS, surely the court of appeals of New York is the proper tribunal to decide.

FIFTH POINT.

The person who did the damage and got the benefit in this case was New York—the State.

Assuming the broad principle, that where any property is taken or *damaged* for a public use it ought to be paid for, we say, *first*, that it is fair that the person who pays for it should be the person who *gets the benefit*, or, at any rate, the person who *does the damage*.

We are neither the one nor the other. The courts below have so found.

It has been found by the trial court and held by the court of appeals that the state made the structure. This is the only thing which obstructs the light and air, and it is only for light and air that the plaintiff in error recovered.

For this, by the act of 1901, New York pays from her own treasury.

> The Court has said in its opinion, that the State by building the structure and then making the railroad companies pay for it, does only by *two* acts what it could have done by *one*, but this can hardly mean that one who is *taxed* and *pays* the tax, is liable for any damages caused by the use of that money by the sovereign to which the money was paid. They—the railroad companies—were compelled to pay but half of the tax—are they then liable for one half of the damage to the plaintiff in error or have they a remedy over against the city of New York for the other half?

Under the opinion of the Court in the *Muhlker* case all the decisions of the court of appeals of New York down to the time of Moore's deed, go into the contract.

These cases, as we submit, hold as follows:—

The legislature, where the fee of a highway is *not* owned

by the abutter, has a right to put a railroad upon it and have that railroad run, without being liable to the abutter. *People* v. *Kerr*, 27 N. Y., 188. This being so, it can put it upon the top of a structure in the street just as well as upon a surface. Even though that structure be unlawful, and take away the abutter's light and air, *the running of the railroad is lawful.* In other words, the plaintiff can recover for the structure, but not for the running of the railroad. This was, we submit, held in the *Story* case. The opinions in that case, carefully distinguishing between the structure and the running of the trains, limiting what is said by the court to the *structure* and expressly and carefully stating that the court did not intend to overrule *People* v. *Kerr*, 28 N. Y., 188, and *Kellinger* v. *Forty-second street R.R. Co.*, 50 N. Y., 206 (Story *v.* N. Y. El. R.R. Co., 90 N. Y., 122, 146, 155, 159, 160, 161, 169–170).

And it is upon this ground that no recovery is allowed for *noise* in the elevated railroad cases.

A. B. N. Co. *v.* N. Y. E. R. Co., 129 N. Y., 252, 273.

Bischoff *v.* N. Y. E. R.R. Co., 138 N. Y., 257, 263.

The People v. *Kerr*, 27 N. Y., 88, was to restrain the defendants from putting a railroad upon the Seventh avenue in New York. It was brought by the people—and abutting lot owners—and the city was also made a party and took the plaintiffs' side of the case. It was proved, and the trial court found, that the title of the city to the Seventh avenue came, as to a part of it, from condemnation proceedings taken under the act of 1813, already referred to as considered in the elevated railroad cases, and that part was held by the city "in trust, nevertheless, that the same be appropriated and kept open as "public streets forever, and in like manner as the other "public streets in said city are or ought to be."

That as to the rest of the Seventh avenue the city had title, in fee simple, by deeds which expressed the grant to be upon the "*trust that the same be left open as public "streets for the use and benefit of the inhabitants of "said city forever.*" The finding of the trial court has already been quoted—that the railroad "would be a "material interference with, and injury to the use and "enjoyment of the lots fronting" on that street "to "such an extent that the same would constitute a con- "tinuous private nuisance to the owners and occupants "thereof, but for the act of the legislature authorizing "the construction of said road," and there was evidence, not denied, that the value of property "would be depre- "ciated 20 to 25 per cent. should the railroad go into "operation" (Appeal Book, fol. 232; Court of Appeals cases, Bar. Asso. vol. 10 of 1863), and the court, speaking by Mr. Justice Emott, said:

(p. 199) "This is a trust for the benefit of the "public, not of the adjacent proprietors alone, nor "of the inhabitants or citizens of New York alone, "but of the whole people." * * * "The title "thus vested in the city of New York is as "directly under the power and control of the "legislature, *for any public* purposes, as any prop- "erty held directly by the State, or by any public "body or officer." And at page 194: "If the "legislature or municipal authorities, under their "sanction, should construct such a track in a par- "ticular street or road, and while allowing all per- "sons to use that track freely with vehicles adapted "to it, should close the road to every other kind "of travel or use, it would, nevertheless, continue "to be a highway and devoted to a public use. "It is equally so, although its use is restricted to "the vehicles of particular individuals, as for in- "stance of a class of persons licensed to transport "persons or property, or of a corporation having such "privilege or authority, provided, these vehicles are "open to the public under proper regulations, and

"may be used by any and every person without "restriction or limitation, except compensation to "the owners of the vehicle." (p. 193) "Even though" "(it) * * * should be an interference with and injury to "the use and enjoyment of the lots fronting on such "streets, to such an extent that it would be a con- "tinuous private nuisance, if it were not authorized "by law, yet the statute granting such authority is "not unconstitutional, or invalid, because it does "not require compensation for this injury to the "owners of such property." (p. 195) "We are "brought to the simple question, whether, in "constructing and using a railway track with city "cars for passengers, through or over the streets "enumerated in this complaint *the defendants will* "*actually appropriate any property* either of the "City of New York or *of the individual plaintiffs.* "*If property of the latter is taken without com-* "*pensation, even for a public use, the statute is in* "*conflict with the constitution;* and the remedy "sought by them in this action is obviously just and "appropriate to prevent a direct invasion of their "own rights." And Judge Wright says the same thing (pp. 210–212).

This case is deliberately approved in all of the elevated railroad cases, and in *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y., 505, it was deliberately followed and applied to a steam railroad in the city of Syracuse. In that case there was a finding of fact that the railroad occupied "a portion of the plaintiff's said "easement" (light, air and access), and

And the Court of Appeals of New York, said (p. 517):

"It was not intended in the *Story* case to overrule or "change the law in regard to steam surface railroads. The "case embodied the application of what was regarded as "well established principles of law to a new combination "of facts, such facts amounting, as was determined, to "*an absolute* and *permanent obstruction* in a portion of "the public street, and in a *total* and *exclusive use of*

"*such portion* by the defendant, and such permanent ob-
"struction and total and exclusive use, it was further
"held, amounted to a taking of some portion of
"the plaintiff's easement in the street for the pur-
"pose of furnishing light, air and access to his ad-
"joining lot. This absolute and permanent obstruc-
"tion of the street, and this total and exclusive use
"of a portion thereof by the defendant were accom-
"plished by the erection of a structure for the elevated
"railroad of defendant, which structure is fully described
"in the case as reported. The structure, by the mere
"fact of its existence in the street, *permanently* and *at*
"*every moment of the day* took away from the plaintiff
"some portion of the light and air which otherwise
"would have reached him, and in a degree very appreci-
"able, interfered with, and took away from him his
"facility of access to his lot; such interference not being
"*intermittent and caused by the temporary use of the*
"*street by the passage of the vehicles of the defendant*
"*while it was operating its road through the street*,
"but caused by *the iron posts* and by the *superstruct-*
"*ure* imposed thereon and *existing for every moment of*
"*the day and night. Such a permanent, total, exclu-*
"*sive* and *absolute appropriation* of a portion of the
"street as this structure amounted to, was held to be
"*illegal* and wholly beyond any legitimate or lawful use
"of a public street. The taking of the property of the
"plaintiff in that case was held to follow upon the *per-*
"*manent* and *exclusive nature* of the appropriation by
"the defendant of the public street or of some portion
"thereof. If that appropriation had been held legal,
"any merely consequential damage to the owner of the
"adjoining lot, not having any title to the street, would
"have furnished no ground for an action against the de-
"fendant. It was just at this point that the disagree-
"ment existed between the members of this court in the

"*Story* case. The judge who wrote one of the dissenting "opinions did not think that the facts presented any "different principle from that of an ordinary steam sur- "face railroad operating its road through the streets of "a city under the authority of the legislature and of the "municipality, in a case where the adjoining lot owner "did not own the fee in the street. The character of "the structure, and all the facts incident thereto, were "regarded by him as simply resulting in an additional "burden upon the street, somewhat greater in degree it "is true than a steam surface railroad, but still it was "such a use of the street as the legislature might permit, "and the legislature having in fact granted it such "power, the use of the street was, therefore, legal, and "the defendant was not responsible for the incidental "damage resulting to one whose property was not in "fact taken within the meaning of the constitutional "provision, and the defendant did him, therefore, no "actionable injury. The other dissenting judges were of "the same opiuion.

"A majority of the court, however, saw in the "facts existing in that case what was regarded as a "*plain, palpable and permanent misappropriation* of "the street, or some portion of it, to the *exclusive use of* "*the defendant corporation*, and as resulting from it the "court held that there was a taking of property belong- "ing to the plaintiff without compensation, which no "legislature could authorize or legalize. But this "taking, *it cannot be too frequently or strongly* "*asserted, resulted from the* ABSOLUTE, EXCLUSIVE "*and* PERMANENT *character of the appropriation* "*of the street by the structure of the defendant.* "There is no hint in either of the prevailing opinions "in the *Story* case of *any intention to interfere with* "*or overrule the prior adjudications in this state* "*upon the subject now under discussion, as to the steam*

"*surface railroads.* In the *Story* case it was argued "that no real distinction in principle existed between a "steam surface and an elevated railroad resting on such "a structure as was proved in that case. This court, "however, made the distinction, and the two prevailing "opinions are largely taken up with arguments going to "show the distinction was obvious, material and impor- "tant, and was so real and tangible, in fact, as to call "for a different judgment than would have been proper "and appropriate in the case of the ordinary steam sur- "face railroad, such as the *Drake* case was." * * *

II.

IT IS NATURAL AND UNIVERSAL LAW THAT DAMAGES SHOULD BE PAID FOR BY THOSE FOR WHOSE BENEFIT THE DAMAGE WAS DONE. TO THIS PRINCIPLE OF UNIVERSAL LAW THE WORLD IS GRADUALLY WORKING UP.

In the days of the good Queen Bess, if Her Majesty wanted anything Her Majesty *took it*, and paid for it if she so pleased.

In the first Constitution of New York the power of eminent domain is not even mentioned, and it is now mentioned only for the purpose of limitation. All constitutions now contain the provision that private property shall not be taken for the public without just compensation. Some constitutions contain the provision that "private property shall not be taken *or damaged* for "public use without just compensation." The Constitution of New York does not contain the latter provision, nor did it at the time when the elevated railroad cases were passed. It so happened that the damage done by

the elevated railroads to private property was enormous, and since those roads, though for a public use, were run entirely for private profit, it was only fair and just that the damage done should be paid for by the companies—it being elemental that no public improvement should be encouraged or permitted unless it will, at least, pay for the damage which it causes.

That this was the true and sole ground for the elevated railroad cases is said by Court itself, and we now quote its text.

In *Bohm* v. *The Metropolitan Elevated Railroad Company*, 129 N. Y., 576, the Court of Appeals of New York, speaking through Judge Peckham, said (p. 587):

"The plaintiffs own no land in the street. Their own-
"ership of the land is bounded by the exterior lines of
"the street itself. Hence when, under legislative and
"municipal authority, the railroad structure was built,
"it was supposed by many there was no liability to
"abutting owners, because no land of theirs was taken,
"and any damage they sustained was indirect only, and,
"therefore, *damnum absque injuria*. When the courts
"acquired possession of the question, *and it was seen*
"*that abutting land which before the erection of the*
"*road was worth, for instance, ten thousand dollars,*
"*might be reduced to a half or a quarter of that sum*
"*in value, or even rendered practically worthless by*
"*reason of the building of the road*, IT BECAME NECES-
"SARY TO ASCERTAIN IF THERE WERE NOT SOME PRIN-
"CIPLE OF LAW WHICH COULD BE RESORTED TO IN ORDER
"TO RENDER THOSE WHO WROUGHT SUCH DAMAGE LIABLE
"FOR THEIR WORK. It has now been decided that,
"although the land itself was not taken, yet the abutting
"owner, by reason of his situation, had a kind of prop-
"erty in the public street for the purpose of giving to
"such land facilities of light, of air and of access from
"such street. These rights of obtaining for the adjacent

"lands facilities of light, etc., were called easements, "and were held to be appurtenant to the land which "fronted on the public street. These easements were "decided to be property, and protected by the Con- "stitution from being taken without just compensation. "It was held that the defendants, by the erection of their "structure and the operation of their trains, interfered "with the beneficial enjoyment of these easements by the "adjacent landowner, and in law took a portion of them. "By this mode of reasoning, the difficulty of regarding "the whole damage done to the adjacent owner as conse- "quential only (because none of his property was taken), "and, therefore, not collectible from the defendants, was "overcome. The interference with these easements be- "came a taking of them *pro tanto*, and their value was to "be paid for, and, in addition, the damage done the re- "maining and adjoining land, by reason of the taking, "was also to be paid for, and this damage was in reality "the *one* great injury which owners sustained from the "building and operation of the defendant's road. For "the purpose of permitting such a recovery, the taking "of property had to be shown."

But in this instance the defendants are NOT *the parties benefited nor did* THEY *do the damage.*

The facts as to this have been already stated, but the main facts are now re-stated.

The defendants had their tracks upon a solid structure consisting of *the solid earth*—in this place a cut—of course *lasting forever without* repair. They are now upon a bridge of iron and steel—liable to rust and disintegration—and sure to need, in the future, continual and expensive repair, which, though it be that *now* they *do not* and *have not the right* to make, it is quite possible that in the end *they may be compelled to make.*

They had a level line. They now have to climb over—both up and down—a bad hill.

The change was not for *their* benefit—but distinctly to their detriment (Court of Appeals of New York, R. 167, 165, Plaintiff's brief, p. 3), and for it they were obliged to pay a million of dollars.

The damage was done for the *benefit* of *the* PUBLIC—and *the* PUBLIC—*ought to pay for it.*

In the Court of Appeals of New York, Chief Judge Parker delivering its judgment in this case, said: (R. 170) —"Undoubtedly the State * * * "still has the "power to authorize ascertainment of the damages to the "abutting owners through its court of claims, and to pro- "vide for their payment, *and it may be well that it would "be equitable to do so.*" In 1901 the state made the law chapter 729 of the laws of that year which is printed in ~~the Appendix to~~ this brief ~~(Appendix I)~~, and by that law it gave (2 Laws 1901, 1787) jurisdiction to the court of claims to "hear, audit and determine the *alleged claims*" of persons owning "real property abutting on Park ave- "nue *for* DAMAGES *alleged to have been caused* TO SAID "PROPERTY by the acts and operations performed" by the board created by chapter 339 Laws 1892—"and to "render judgments therefor against the state and in "favor of said claimants."

This means diminution in value.

Chicago *v.* Taylor, 125 U. S., 161.

2. THE STRUCTURE HAS BEEN PAID FOR BY TAXATION, AND THE PLAINTIFF CAN BE PAID FOR BY TAXATION—OF OTHERS, OR EVEN OF HIMSELF. THIS COULD NOT BE UNDER THE RULE OF THE ELEVATED CASES.

20 Jun. '92. In Bohm *v.* M. E. R. Co. (129 N. Y., 576), the Court of Appeals of New York, speaking by Judge Peckham, said (p. 586):

"Before entering on a discussion of these matters I "think it proper to say that I should hesitate to admit

" the correctness of the claim made by defendants that " *where private property is taken by a mere business* " *corporation, as for a public use under the granted* " *power of eminent domain, the legislature could provide* " *that such property could be paid for by benefits accru-* " *ing to the landowner's adjacent property consequent* " *upon the taking.* This is the case in regard to munici- " pal corporations where land is taken for a public street, " or other public and municipal purpose, and where the " benefits arising to the adjacent lands of the owner " whose property is taken may be set off against the " value of the land taken. So in the case of property " taken by the state for canal or other public purposes, " where the owner of the land was frequently paid its " value by the benefits received to the adjacent land " not taken. The principle underlying these cases is, " however, the right of the muicipality or state to tax " the owners of the land left, in order to pay for the land " taken, on the ground that they are specially benefited " by the taking, and hence should be specially taxed for " the payment of the land. The case of *Genet* v. *City of* " *Brooklyn* (99 N. Y., 296) is no authority for a contrary " view, for I think it supports that which I have sug- " gested. *A mere trading or business corporation has* " *no power of taxation,* AND THE STATE COULD NOT DELE- " GATE SUCH POWER TO IT. If *such* company desire " another's property *it must pay a just compensation* " *for it, and that compensation would not consist* IN ITS " DOING THE OWNER SOME BENEFIT UPON HIS REMAINING " PROPERTY."

The object of this point and the above quotations is simply to try to satisfy the Court that—

1. By the elevated railroad cases the *structure* was the thing paid for and not the running of the trains—and that distinction, we submit, is also made in the Court's opinion in the *Muhlker* case—

2. The the finding in this case is the same—only damage for *the structure*.

3. That the defendants are not liable *for the structure*, but the *State* is.

4. And New York having provided for the payment out of her own treasury for the damages caused by *the* structure in case the railroad companies were *not* liable for them, and the court of appeals of New York having held that the railroad companies ARE *not* liable, the judgment is right, and should be affirmed.

SIXTH POINT.

Observations on Brief of Plaintiff in Error.

The brief on behalf of plaintiff in error is so voluminous as to forbid the attempt at response to its propositions in detail.

Its statement is that "the questions raised upon this appeal are substantially the same as arose and were decided in the Muhlker case," and that is "whether Chapter 339 of the Laws of New York of 1892 as interpreted by the Court of Appeals in that State is constitutional in so far as it authorizes the construction of the viaduct in question and the taking of the easements of abutting owners without compensation" (page 2).

Further along it is stated "it is not necessary in this case for this court to decide the question whether the act of 1892 was or was not unconstitutional. That act nowhere states that the railroad companies shall be free from the obligation of paying for the easements they have appropriated, and this is pointed out in the Fries case by the able dissenting opinion of Judge Cullen" (page 46). And this is the statement of how the Federal constitution has been offended against, to wit: "The statute provided for the erection of an elevated railroad. The Supreme Court of the State of New York held that plaintiff was entitled to compensation for the property taken in the construction of the road. The Court of Appeals held otherwise, and that because the State had commanded the erection the plaintiff was not entitled to such compensation. It is this *decision of the Court of Appeals* that we seek to have reversed. It is that *authority exercised under that act* that we seek to have overruled in this case" (page 47), and authorities are cited in support of the proposition that "the prohibition in the fourteenth amendment applies to * * * judicial authorities" (page 48).

As regards defendants' contention in and by their answer, the brief states that they "denied the street use or trust as to the portion of the street occupied by the railroad" and "set up the various statutes of limitation and a claim to title by prescription" (page 4).

NOTE.—The answers set up claim of title by adverse possession, based upon all the grants, consents, acquiescence, users, and other facts and circumstances set up in the answers, and which, being unsupportable by any mere incorporal right to pass over the land, pointed to and evidenced title sustaining the right to possess the land to the exclusion of all others.

A statement which would be unimportant if correct, but demands a passing notice because of its inaccuracy, is that "the constitutionality of the State statute, in so far as it operated to deprive the plaintiff of compensation for her easements, was assumed in the Supreme Court by the trial Judge, and by the Supreme Court, Appellate Division" (page 7).

Nobody disputed in either of those courts, nor in the Court of Appeals, the right of the plaintiff to have compensation for such, if any, easements as she was legally entitled to as against the railroad company and the public, and hence there was no occasion for any court to, and neither thereof did, hold the law unconstitutional; but, adjudging that plaintiff's easements had been trespassed upon and were taken, adjudged her compensation in obedience and conformity to the well-established law and practice pertaining to the state of facts adjudged.

Apparently for the purpose of giving life to easements antedating the building of the railroad, it is stated with reference to the map filed in 1811, under the Act of 1807, that "the New York courts have frequently decided that the filing of such a map pursuant to legislative authority involves a devotion of the lands designated on the map to the corporate uses of the municipality, or for the benefit of the corporation on whose behalf the map is filed" (page 12).

That seems a rather monstrous proposition to assert in a case calling in question the taking of property for public use without compensation. If Benson's property could be and was thus dedicated to public use by the act of the city in making a map, the proceedings of 1853 and thereto incident payment of compensation for the same land would seem to have been superfluous.

On the contrary, when the railroad entered and instituted its proceeding to condemn, Benson's right was not that of a mere easement for his abutting property in,

upon and over the 100-foot strip, but the ownership of the fee of both. By that proceeding the railroad company acquired from him the fee to the 24-foot strip, and it was so adjudged in the condemnation proceeding, and so adjudged by all of the courts in this case.

Moreover, within the time intervening between that proceeding and the proceeding for the opening of the avenue Benson conveyed to Bruce, and when the City acquired the title that it did acquire in the street opening proceeding, in that portion of the 100-foot strip outside of the 24-foot strip, it acquired it from Bruce (Plaintiff's Exhibit H, opposite page 49). Thus the street was created as a railroad street, with the right of the defendants to maintain their railroad structure within the centre 24-feet, of any height the corporate purposes might render desirable, and such is the legal effect of the decision of the trial court (Paragraphs "Fourth" and "Sixth," pages 16 and 17).

The right of the railroad was not that of the mere passage of its engines and trains upon tracks at or upon the ground surface of the street of the future avenue, but wholly without reference to either of these.

SEVENTH POINT.

The judgment is so obviously maintainable upon the independent ground adjudged by the State Court, not involving a federal question, that the writ of error should be dismissed or the judgment affirmed.

When the four-track structure was built, and during its use, the exclusive possession of the land, the law

and physical fact shutting all other persons and uses from it, constituted the assertion of such property right and title as would serve to explain and justify that character of possession. It was in every respect and particular identical with that of possession of the centre 24-foot strip to which the railroad held title in fee.

No grant, either express or implied, of the mere right to maintain and operate a surface railroad would serve to either explain or justify that character of occupancy.

The character of possession gives character to the title which that possession constitutes assertion of. When the trial court found, as it did, that the railroad company had acquired the right to thus exclusively possess and occupy, in perpetuity, the ground occupied by its two outer tracks, such finding could only be based upon and supported by a title by and to occupancy of, as distinguished by or to the mere right of passing over the land.

The line of reasoning which would lead to the conclusion that a title evidenced by or growing out of such exclusive occupancy and use of the approximately 60-foot strip of land would be inadequate to justify the occupancy and use of the same land with a higher railroad structure, would, by the same rule of logic, lead to the conclusion that one having entered under color of title in fee and possessed for the statutory period of limitation a tract of land with a one-story building thereon, could not, by the title thus acquired, and evidenced, justify a subsequent possession of the same tract of land with the maintenance of a two-story building thereon.

The Elevated Railroad Cases.

In the elevated railroad cases the defendants did not and could not set up any claim of having acquired from the abutting owner any property right in addition to that which had been reserved or acquired by the public for public street purposes. The railroad companies stood

upon the consents granted to them by the public authorities, and upon these contended that the maintenance and operation of their railroads were consistent with and, indeed, a part of the public street use reserved or acquired by the public, and hence they were not liable.

The ground upon which *Story* and subsequent complainants were adjudged entitled to recover was that this contention of the railroad companies was untenable. The field of the inquiry which led to that determination did not at all involve the question whether complainants had parted with any property right or contract right other than and in addition to that reserved or acquired by the public for public street uses, because there was no foundation for any such claim, nor was it asserted. When Story purchased his premises he found the street upon which they abutted an open street, just such as was called for by the terms of the grant under which the street was created and abutters' rights vested. In reliance upon his asserted right to have that condition continue, he alleged the threat and intent of the defendant railroad company to build its elevated road, and prayed injunction to restrain it from so doing.

Altogether different are the facts in the case at bar. When this plaintiff purchased the premises abutting upon Park Avenue described in the complaint, he found those premises abutting upon an open street or avenue of the width of 40 feet, and next to that a 60 foot strip of land occupied and used solely and exclusively for railroad maintenance and operation, and upon the opposite side of that strip of land another like open street or avenue, upon which the premises opposite to and 140 feet distant from his abutted. Upon his negotiation for the purchase of the premises described in the complaint, he was charged with notice and presumably had actual knowledge of the occupancy and use of that 60-foot strip of land. The rightfulness of that occupancy and use was open to in-

quiry, and, it is but fair to presume, was the subject of such inquiry as plaintiff saw fit to make concerning it.

In the language of Martin, *J.*, the *Conabeer* case (156 N. Y., 474), at page 493, "he purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendant's grants. With that knowledge, presumably, she (he) made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendant's railroad, and hence lost nothing by being deprived of any of her (his) otherwise appurtenant easements."

Inquiry upon that subject at that time would have and presumably did afford him the knowledge which the evidence in this case disclosed, that the public street had never been opened upon or over or occupied the same ground as the railroad; that the street had from its inception consisted of the public highway upon either side of the railroad and not of the railroad ground. Whereas *Story* in his purchase had every reason to suppose that he was acquiring the same property right and the same measure of property right and contract right which the deed of the City under which the street was created, and under which the rights of his predecessor in title, the immediate grantee of the City, were vested; and that such was the character and measure of his property and contract right stood undisputed; in the case at bar this plaintiff at his purchase had open and notorious information that the rights of his grantor were not the equivalent of those which vested in the immediate grantee of Poillon, plaintiff's remote predecessor in title.

The question which this case presented was not at all that of the right of the State or the railroad company, or both, to maintain an elevated viaduct structure with a railroad thereon, founded merely upon the right to operate

a surface railroad in the street, such as the *Kerr* case and *Fobes* case involved.

The earth surface in and upon which those railroads existed and were operated was a part of the open public street, the same identical parcels of ground used in common by both the railroad company and the public. The passing of railroad engines, cars and trains over the tracks differed in the degree but not in the character of their interference with the general public use of the same portions of the street's surface, from that of other vehicles passing over it; and the determination and adjudication that such railroad use is not inconsistent with street use is founded upon the fact that the one use does not exclude the other.

On the other hand, the case at bar does not at all involve the question of the right of existence and operation of an elevated railroad structure upon and over a theretofore existing open public street, for the operation of a railroad thereon which had theretofore used the street, or the same portion thereof in common with the general public, but the question is as to the right of existence and use of such railroad structure over the strip of land thereunto rightfully, as against abutting owners, occupied and used by and for the railroad to the exclusion of every other occupancy and use.

Obviously the doctrine of law which sustains the right of existence and use of an elevated railroad structure over the same strip of land theretofore rightfully occupied and used exclusively for railroad purposes, constitutes no determination of the question whether a railroad such as the *Fobes* case dealt with, might be placed upon an elevated viaduct structure over the theretofore open street, without liability to abutting owners; nor does it at all involve the doctrine of the elevated railroad cases holding such structure inconsistent with the open street

to which the complainants in these cases were adjudged entitled.

This 60-foot strip of land is now a part of the public street by virtue of the act of 1892. As against this plaintiff the trial court has adjudged that it was the right of the railroad company to occupy this land to the exclusion of street uses, as it had done prior to the act of 1892, and hence that, but for that enactment, it was not the right of the plaintiff to have an open street, or any street, over that strip of land.

THE LEWIS CASE.

The contention on behalf of complainant in the *Fobes* case was that the rule of the elevated railroad cases was controlling as to the railroad and its use of which he complained.

So here the similarity of conditions presented by this structure and its use to that of the elevated railroads complained of in the Story and Lahr cases, at first blush, seemed to favor the theory that all contentions and controversies in respect thereof were within and governed by the principle of the adjudged elevated railroad law. It was with seeming difficulty that the fact that the same ground was never before used for both street and railroad purposes, constituted a factor in the solution of the question of easement rights in and over the railroad ground which by the Act of 1892 became, *in fact*, a part of the street.

The court recognized some of the distinctions between the ordinary elevated railroad case and that regarding this structure in the Lewis case, but was, nevertheless, as we respectfully submit, led into quite obvious error by the influence of the natural leading of the consideration above mentioned. The right controverted in the elevated railroad cases was that of the construction and use of the elevated railroad in a theretofore free, open street. The

character of occupancy and use of the street which the elevated railroad contemplated and effected was such as might with some measure of reason and propriety be termed a mere easement or incorporeal hereditament, the right of which as against abutting owners might be the subject of express or implied grant, and if the latter, might, with a measure of propriety at least, be characterized as a title by prescription; that is to say, it involved a unity of use of the street as an entirety by the railroad, its stations and approaches, and by its passengers as such, coincident with the use of the same street by the general traveling public in the ordinary public street uses. When, as the result of the act of 1892, the center strip of land was included in and made a part of the open traveled street or avenue, with the railroad bed above it, supported by columns resting upon masonry imbedded in the soil of the street, the conditions created were very like those existing in the elevated railroad avenues. In this very particular, however, the former railroad structure, the occupancy of the ground covered by it, and of the soil of that ground exclusively for railroad purposes, and the structure maintained in such manner as to exclude the public from the railroad ground, differed in character entirely from the occupancy and use of the avenues by the ordinary elevated railroad, and from the occupancy and use of this avenue by the now existing Park Avenue viaduct structure.

Title by prescription is not recognized upon either principle or authority as the title upon which to rest a right of sole and exclusive possession of, and the maintenance of fixed physical structures upon, a tract or strip of land. The exclusive possession and use is not the exercise of a mere easement right, or the character of evidential fact tending to show that incorporeal right; while it includes the right of passage upon and over the strip of land, it includes also very much more than that,

in that it is the physical possession of the land of the character designated in the law as "adverse possession."

When the plaintiff purchased his land abutting this avenue, then of the open width of 40 feet, upon which his premises abutted, and saw the adjoining 60 feet devoted to and used exclusively for railroad purposes, this was not merely notice of a right to operate a railroad upon the street surface, such as the *Fobes* case dealt with, but a right to possess the lands to the exclusion of every other occupancy and use. It was such notice as to put him upon inquiry concerning the right of the railroad company to do what it was there openly doing in that regard. It was a notice of adverse possession of the land, and not of a mere right to move engines, cars and trains over it. That inquiry pointed to the record of the deed to which the possession was to be imputed as explanatory of it; it led to evidence of a possession continued for upwards of 50 years, during which the ground occupied by the railroad had never been used by the public in common with the railroad. Such inquiry led to the record of the deed explanatory of that exclusive possession, and which purported to grant and release, not merely the right to build, maintain and operate a railroad upon the surface of the avenue, or upon the surface of the ground, but specifically to occupy with its embankments or excavations the full width of 100 feet. It was a present and perpetual release of all damages resulting to premises abutting the avenue, not merely by a railroad upon the earth's or avenue's surface, but elevated or depressed, as it might be, by embankment or excavation of the width of 100 feet.

It is no answer to this to say that the deed when made did not carry good title because the grantor therein had at this particular point already parted with his title. The deed constituted the color of title under which the railroad company from 1835 to 1897 maintained its contin-

uous, hostile, open and exclusive possession of so much of the property described in the deed as was requisite for its railroad structures as within that time maintained and used. The character of deed which that possession constituted notice of to plaintiff was not that of a property right which would justify maintenance of a railroad upon and over ground to be used by it and the general public, but of a deed vesting or purporting to vest the right to such exclusive possession as was there exercised.

One of the errors which intervened in the *Lewis* case, and which was corrected in the *Fries* case, was that of a proper recognition of the source and character of title, or color of title, upon which was maintained the exclusive possession by the railroad, which the trial court in each of the cases adjudged the defendants entitled to. The character of the title to which that rightful exclusive possession was ascribed in the *Lewis* case, to wit: that of title by prescription, did not embrace proper cognizance of the nature of title requisite to justify that which the court found to be justified. The court in the *Lewis* case conceived, and went upon the hypothesis, that because the railroad company had the consent of the City to the building of its road in the laid-out but then unopened avenue, therefore it could not be permitted to claim title under its deed from Benson produced in evidence, but nevertheless might be permitted to claim title under a deed supposed to be lost; and, upon that hypothesis, it was held that, as between the railroad company and the City, the railroad possession was presumably under and in subordination to the title of the City; but that as against the abutting owner it was hostile and of character to evidence the acquirement of title; but the title presumed to have been acquired, instead of that which the deed put in evidence purported to grant, was that under a deed presumably lost, and presumably carrying only such property right as was requisite for the maintenance and use of the succes-

sive railroad structures which existed prior to the present one. And right here it may aid to correct apprehension of the status of respective right between these complainants and the railroad company, to consider just what condition of affairs existed immediately prior to the building of the two-track railroad structure.

The map of the City of New York, including this avenue of the width of 100 feet, had been made and filed in 1811. The act under which it was made imposed no obligation upon the City to open the streets shown upon this map, but left it to the City to determine from time to time the question of opening, and it is a matter of common knowledge that many of them never have been opened, and it is not intended that they ever shall be. To be sure, the plaintiff's grantor Poillon had granted to the City, in trust for street purposes, this 100-foot strip of land, but the deed had not been recorded and the City had not taken any action indicating either its acceptance of the trust or its purpose to open this avenue at that point either then or at any future time. The resolution of the City Council made no reference to particular land, or land of any particular locality, other than land over which the line of the railroad from Twenty-third Street to the Harlem River had been located.

The charter of the Harlem Company obviously contemplated a railroad which should exclude the public from its ground, and, instead of proceeding upon the hypothesis of the *Kerr* and *Fobes* cases, that if the railroad were located within the bounds of a public street the public consent would constitute sufficient authority for their maintenance and use of the road, the charter, on the contrary, specifically and peremptorily compelled the railroad company to acquire the property not donated for its right of way, and for that purpose gave it the power of condemnation. The railroad company did not proceed upon the hypothesis that public consent constituted sufficient

authority for the building and maintenance of its road where it was located. On the contrary, it proceeded to acquire, by condemnation in some instances, and by deeds in others, the title of and for its right of way, in obedience to the command of its charter. Having gotten these, it proceeded to build its road, and had it in operation in or about 1835.

The character of its possession is only properly ascribable to such character of deed or muniment of title as would be adequate to authorize and warrant such character of possession. A deed purporting merely to grant the right of passage of engines, trains and cars over the surface of the ground until the street was opened, and upon the surface of the street after that, would not have been sufficient to authorize the maintenance and use of railroad structures which excluded the grantor and the public from the ground occupied by them. Any deed fairly within the contemplation of a title or grant by "prescription" would constitute no sufficient warrant for that character of possession. The railroad structure, and use of it, as plaintiff saw them prior to his purchase of the premises described in his complaint, was notice to him of the title which gave a right of possession to the exclusion of all other occupancy and uses, and which included every beneficial right and interest in the land. When this case went to the Court of Appeals, and that court found in the record the finding of the trial court as set forth in its decision, and searched the record for the nature and character of the evidence on which that finding was founded, that record showed it to be based, not upon title by prescription, or a deed supposedly lost, but upon the muniments of title proven, including the deed set forth in the evidence as constituting the color of title under which the exclusive possession had been maintained, and which the trial court had found to be rightful.

The ground upon which the trial court held the plaintiff disentitled to recover in respect of the maintenance and use of the railroad structure existing at the time of the 1892 enactment was, not that there had not been a property right or contract obligation which, if still in force, the maintenance and use of that structure would be inconsistent with; but by the muniments of title set forth "the said defendant railroad companies acquire the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894, as hereinbefore described;" in other words, that the property right or contract obligation upon which plaintiff relied had been released to and acquired by the railway companies.

This determination of the trial court was founded upon its interpretation, construction and legal view of all of the facts, circumstances, grants, express and implied, and other oral and documentary evidence before it.

The adjudication of the trial court was that the property rights which the railroad companies had acquired from the predecessors in title of plaintiff, and from plaintiff, were such as entitled them to the exclusive occupancy and use of that strip of land for railroad purposes without liability to the plaintiff.

The ground upon which the trial court concluded and determined that the existence and use of the elevated structure constituted a trespass upon plaintiff's property rights, was, not that plaintiff was entitled, as against the railroad companies, to have this strip of land opened for ordinary street uses, either relieved of the railroad or otherwise, for the court had expressly found to the contrary; but, upon the ground that the right which the railroad companies had acquired to occupy and use this 60-foot strip of land exclusively for railroad purposes was

not such as could justify the maintenance and use of an elevated railroad structure upon and over the same strip of land, which the court had determined that the railroad companies had acquired the right to occupy and use for railroad purposes to the exclusion of all other occupancy or use.

When by the appeal of defendants, first to the Supreme Court, Appellate Division, and second to the Court of Appeals, the jurisdiction of those courts was invoked to review and determine the accuracy of the judgment of the trial court in adjudging these property rights as aforesaid acquired by the railroad companies as insufficient to justify the maintenance and use of the existing railroad structure, those courts in turn were called upon to interpret, construe and adjudge the legal effect of, not at all the contract obligation under which easement rights had become vested in plaintiff, or her predecessor in title, but rather and solely the legal effect of the instruments, grants, express and implied, and other muniments of title which had been acquired from them by the railroad companies, and which the trial court had determined was sufficient to justify the maintenance and use of the 1872 railroad structure, but insufficient to justify the maintenance and use of the 1892 railroad structure.

The result of that review by the Court of Appeals was the determination that the property rights which the railroad companies had acquired from and against plaintiff and his predecessors in title, and which the trial court had found and adjudged sufficient to justify the maintenance and use of the 1872 railroad structure, were sufficient to justify the maintenance and use of the 1892 railroad structure.

In the consideration and discussion which led to the conclusion by and upon which these cases were distinguishable and distinguished from the ordinary railroad cases, the State courts had no occasion to examine with

particularity the question of similarity or of difference between the original property rights or contract rights of the parties in the one class of cases as compared with those in the other, because the controverted question presented did not relate to original conditions, but to subsequent changes or modifications thereof. In the ordinary elevated railroad cases the abutting owners had parted with nothing of either property right or contract right except that which had been granted or taken for public street uses; while in these cases it was equally undisputed that the railroad companies had acquired from the abutting owners, and the abutting owners had parted with some property rights and contract rights other than and in addition to those granted or taken for public street uses, and the question before the court was as to the extent of the rights which the railroad companies had thus acquired, and these plaintiffs and their predecessors in title had parted with. Thus, in the *Fries* case (169 N. Y., 270), O'Brien, *J.*, writing for the Court of Appeals, having in the earlier portion of his opinion stated that the parties had discussed before the court the effect of a certain deed to the railroad by the former owner of plaintiff's proerty, and other details relating to the right of the railroad construction and maintenance in the street, and that in the view of the court this discussion was unimportant, because the decision of the trial court contained the express finding that the property rights and contract rights which the railroad companies had acquired were such as entitled them to maintain and use the railroad and railroad structures as they were maintained and used to and until February, 1897, without liability to the plaintiff, and that the character of maintenance and use as thus found to have been rightful was such as totally excluded the predecessors in title of plaintiff, and plaintiff, and the public, from all access to or over or use of the strip of land theretofore and now occupied by the railroad, pro-

ceeded to discuss the right of the State as against Fries, to do what it did, in view of the rights which the railroad companies had as aforesaid acquired from Fries and his predecessors in title, and announced the conclusion that because of the rights so acquired, the act of 1892 and the authority exercised and acts done thereunder were rightful. The learned judge on pages 278–279 (160 N. Y.,) announces specifically the ground of distinction between the elevated railroad cases and the case before the court as follows:

> "The elevated railroad cases in this court proceed "upon the principle that, as against abutting owners, "the railroad was unlawfully in the street as they "had not consented to the construction or conveyed "the right to interfere with their easements. But "in the case at bar we have an express finding that "the defendant had acquired the right as against "the plaintiff to use the street for the operation of "the railroad. Hence, the principles upon which "that mass of litigation proceeded have no applica- "tion to this case, and so this court has held. "(*Conabeer v. N. Y. C. & H. R. R.R. Co.*, 156 "N. Y., 474)."

Having in mind the fundamental rule and doctrine that the right of review and to reverse upon review is dependent upon the finding that the judgment is erroneous, in that it is not sustainable upon any ground that is not violative of the Federal Constitution, in some one or more particulars complained of, and that such right of review and reversal does not at all arise upon mere erroneous statement in the opinion announced, it is obviously more specious than sound to grasp at such supposedly erroneous statements in the opinion, and which, indeed, can be deemed erroneous only by reason of considering them as having no relation to facts set forth elsewhere in the same opinion, and, upon such disjointed excerpts of the opinion, assume the province of reviewing and reversing the judgment.

Each expression in the opinion is to be regarded as but a part of the entire whole. Each statement is to be taken together with and in the light of every other statement, which together constitute the entire opinion.

The judgment of the state courts determines solely the question of the liability of the railroad companies to the plaintiff. Plaintiff's complaint was against the railroad companies. It alleged that they had constructed or were constructing and intending to complete and maintain this structure, and when complete to operate the steam railroad upon it. The proof utterly failed to show that the defendants were the builders of the structure. The proof showed, on the contrary, that the structure was built by the State. That proof was undisputed. The finding is that the structure was built as provided by the act of 1892, to wit: by a state board created for that purpose. At the time of the trial the structure stood where it was built, and stands there to-day, not by reason of anything that the defendants have done, but by reason of the character and strength of the structure which the state built. The railroad companies have no more right to remove it than the plaintiff has. The determination of the trial court was that the railroad companies were not answerable in damages for the building of that structure. To have reached any other conclusion would have been to say that the railroad companies were answerable in damages for what the State did, which the railroad companies could not prevent, and with the continuance of which the railroad companies are powerless to interfere. What is true of the building of the structure is true regarding its existence as built so far as concerns the existence of this structure, and any damages resulting from it to the plaintiff; it is not a case of a structure created or existing by the act of the defendants, either with the permission of or in obedience to the command of the state, but by the act of the

state itself, through the board created by it for that purpose. If this structure is of such unlawful character that it is the right of any one, other than the state itself, to remove it, it is as equally the right of this plaintiff as of the defendants.

Injunction against the defendants' use of the structure would not serve to remove the structure. A mandatory injunction against the defendants commanding them to remove the structure would certainly be unwarranted, for it would command the doing of a thing which they have no legal right to do; and, furthermore, as now appears, it does not at all follow that because the plaintiff is not entitled to hold the defendants answerable for a thing which they did not do, and with the consequences of which they are powerless to interfere, that therefore he is without remedy.

The Court of Appeals pointed out the proper source of plaintiff's remedy, and the state has, as above shown, by Chapter 729 of the Laws of 1901, provided that remedy against the state through its Court of Claims.

If upon any view it be the legal right of this plaintiff to have restored the conditions existing at the time of the 1892 enactment, whatever right he had in regard when this suit was instituted, he had as the foundation for objection to the work when the State by its board commenced the work of building an elevated structure opposite his premises

During the five years that that work was in progress it was open and notorious. His right to speak then was clear. Upon reason and equity it would seem that his duty to speak then was equally clear, and that he failed to speak when he should, and thereby waived his right to be heard now. He saw that work go on to its result and consummation, which he knew from the first to be the designed result and consummation. By that work thus

conducted and completed under his observation and notice the former railroad structure was destroyed and the present one supplied, not by the railroad company, but by the State. The inquiry naturally suggests itself, upon what foundation, as for what reason, should the railroad companies be at the expense of undoing what the State did, and what, if plaintiff now has any right of complaint, he had the right to speak against and prevent the consummation of. Upon what principle of law or logic should plaintiff be permitted to remain thus silent and apparently acquiescent while this great work was carried on to its consummation, and now seek to saddle upon the the railroad companies the expense of restoring that which he might have prevented deprivation of by timely intervention on his part.

THE MUHLKER CASE IN THIS COURT.

The theory of fact upon which this court has proceeded to adjudge the reversal of the judgment of the state court in the Muhlker case, is:

That the plaintiff's property right of light and air in and over the entire 140 feet width of Park Avenue was identical with the like property right of *Story* and *Lahr* in and over the streets upon which their property abutted, save and except only that plaintiff's such property right was subject unto such limitation and interference as resulted from the right of the railroad companies to maintain and operate their railroad upon the street surface, as in the *Kerr* and *Fobes* cases, or in and upon the railroad structure built and used under the act of 1872; whereas, the real fact was and is that by the deed of Poillon to the defendant Harlem Company, and the more than sixty years' continuous, hostile, open and notorious possession under the claim, as against plaintiff and his predecessors in title, of the title which the said deed purported to grant, plaintiff's said property right of light and air in

and over the said avenue was subject unto the right of the railroad companies to maintain and use their railroad at its present elevation, supported by a solid embankment with slopes occupying the width of one hundred feet. (Record, page 49.)

Upon and by reason of the foregoing misapprehension regarding the facts in the case, this court has supposed that the act of 1892, as construed and adjudged by the state court, operated to take from plaintiff his said property right of light and air vested in him subject only unto the limitations first above stated, and that the state court had adjudged this operation of the statute a lawful exercise of the power of the state, because the design and effect thereof was the enlargement and improvement of the avenue for public travel therein; whereas, the true foundation of the judgment of the state court, in holding valid the said enactment, was, that the railroad companies had acquired, from and against plaintiff and his predecessors in title, all beneficial right and interest in the sixty foot strip of land, so that plaintiff had no property right of light or air or otherwise in or over it, because he and his predecessors in title had specifically released the right to object to the existence and use of a railroad at the elevation it now exists; and, hence, that the damage or loss resulting from the change of railroad structure was not the result of any legal injury: and upon this view it was that the state court adjudged the 1892 enactment not violative of the Federal Constitution.

It is only by means of revision of the judgment of the State court upon the above-mentioned rules of local property law that a status is presented apparently violative of the Federal constitution, and it is but fair to the State Courts and to the parties hereto that the measure of this court's revision of such local property law of the State be stated with reasonable precision.

Indeed the rules of law to which these directions pertain are in no whit less solely those of local property law, than those upon which this court adopted the rule of the State courts in preference to that which it had itself twenty years previously announced.

Suydam v. *Williamson*, 24 How., 427.

We respectfully submit that the writ of error should be dismissed or the judgment should be affirmed.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In Error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park Avenue and One Hundred and Fifteenth Street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park Avenue, in front of said premises." The defendant, The New York

and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park Avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

> "FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is

supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"SEVENTH.—That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad

in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"TENTH.—That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plain-

tiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* vs. *New York & Hudson River Railroad* (162 N. Y., 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad* (162 N. Y. 202), both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

> "The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* vs. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence,''

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in perform-

ing the duties devolved upon it a railroad may be required to exercise the right of eminent domain (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287); see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.* (109 Mass. 103). We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's prop-

erty without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial Court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be, as expressed by Bartlett, *J.*, in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial, that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery

to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett* v. *Johnson* (15 N. J. Eq. 481), there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* vs. *New York Elevated R.R. Co.* (90 N. Y., 122) and *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 268), known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front Streets in the City of New York, on which there were buildings.

To their enjoyment light, air and access were indispensable, and were had through Front Street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front Street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid, on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation

that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the

street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* vs. *Lowerre* (6 Johns. Ch., 439), or the freight depot in *Barney* vs. *Keokuk* (94 U. S., 324).

The conclusion of the Court and the distinctions made by it were repeated in *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 271). The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question prcsented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the

city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and it was contended that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged

in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corpo-

ration the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would — and probably would not if it could —deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument; it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R. W. & O. R. Co.* (121 N. Y. 505), where a steam railroad was permitted upon a street without liability for consequen-

tial damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more

conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and it is there said, "established beyond question the existence of these rights, or easements of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

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of the Court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R.R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R.R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R.R.*, 90 N.Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N.Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expecta-

tion that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts,

Burgess v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But, again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now

is open to travel, and that an impassable barrier along its width has been removed; in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional

limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation.

Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

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NOTE.—The "Supp. to Brief," quoted within, is the pamphlet entitled "Legislative Enactments and Judicial Opinions."

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Dissenting Opinion— " " " 1

Supreme Court of the United States.

PATRICK KIERNS, as Executor, &c.,
Plaintiff-in-Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL

and

HUDSON RIVER RAILROAD COMPANY,
Defendants-in-Error.

October Term, 1904.
No. 203.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Fact.

This is a proceeding by writ of error to the Supreme Court of the State of New York, allowed by his Honor, Chief Judge Alton B. Parker (page 69), to review a final judgment of and rendered and entered by that Court at a Special Term thereof, dated March 31, 1903 (page 62), upon and in conformity with the remittitur of the Court of Appeals, dismissing the complaint of the plaintiff upon the merits.

THE COMPLAINT.

The action was commenced September 23, 1897 (page 2), and plaintiff Kierns in and by his complaint therein (page 3), alleged ownership since *April 12, 1882*, of therein described premises, situate at

the southeasterly corner of Park Avenue and 114th Street, having a width of 17 feet 5 inches on the street and a depth of 100 feet 11 inches upon the avenue; that the avenue is, and has been, since prior to 1870, a public street, established by proceedings under Chapter 86 of the Laws of 1813 and amending acts; that he, as appurtenant to his said premises, has rights and easements therein; that defendant Harlem Company is the owner, and Central Company is, and since April, 1873, has been, the lessee of the described railroad and railroad structures which were operated by steam by the Harlem Company prior to 1873 and by the Central Company since that time; that, subsequent to said lease, defendants, without right or authority as against plaintiff or his predecessors in title, excavated in Park Avenue in front of said premises and constructed in the cut or depression thus formed with masonry a wall extending above the surface of the avenue, the railroad which they have maintained and operated by steam engines for more than six years last past; that in or about April, 1893, defendants commenced, and have since continued, the construction of a permanent elevated railway structure, supported by columns of iron and steel, standing on pedestals of masonry imbedded in the soil of said avenue; that this structure substantially and materially interferes with and impairs the easements of light, air and access appurtenant to said premises; that the maintenance and use of this structure constitutes a trespass upon plaintiff's said easements, which will be constant and continuous; that the said acts of the defendants have been, are and will be, without warrant of law, without his consent, and that to prevent multiplicity of suits he invokes the equitable interference of the Court, and prays damages for the trepasses committed and an injunction restraining the further maintenance and operation of the elevated road in front of his premises.

ANSWER.

The answers of the defendant railroad companies (page 6), *inter alia*, denied that they had built, or were building, or intended to add to or complete, the elevated railroad structure; admitted ownership and lease of and previous maintenance and operation of the railroad and the purpose and intent to operate it on the elevated structure upon its completion; and further alleged:

That pursuant to the act of 1807 a map or plan of public streets was filed April 1, 1811, exhibiting Fourth Avenue of the width of one hundred feet. That by the act of 1831 the N. Y. & Harlem R.R. Co. was incorporated to construct a railroad within the bounds and between the termini named, and in pursuance thereof located its road and made and duly filed a survey and map thereof, which, by resolution of October 22, 1831, was duly approved by the proper city authorities, which road, as located, occupied a twenty-four foot strip of land having its center line coincident with the center line of Fourth Avenue, as exhibited on said city map.

That by ordinance of December, 1831, the city council granted permission for the building of the road upon conditions which were agreed to by and between the city and the railroad company of date January 9, 1832. That thereafter the railroad company *acquired title to the said twenty-four strip of land* extending from Harlem River to Forty-second street, including that *in front of plaintiff's described premises*, with the power of *sloping embankments or excavations the full width of the avenue*, and many years prior to the city's acquirement of title to the avenue the railroad company had its road constructed and in operation upon the said strip of land and so continued until the changes required by the acts of 1867 and 1872, respectively, were successively made. That by reason of the existence of the railroad, and in pursuance of the

memorial of the Mayor, etc., the act of 1837 was passed altering the city map by adding twenty feet upon either side of this avenue.

That the railroad company's *acquirement of its said title and building of its road* was many years prior to plaintiff's acquirement of title, if he has any, to the premises described, all in pursuance of said act of incorporation and with the acquiescence of plaintiff's predecessors in title. That in pursuance of the act of 1848 the New York and New Haven (now New York, New Haven and Hartford) Railroad Company in that year acquired from the Harlem Company the right to run its trains over this portion of said railroad, which it has ever since done and is now doing. That by proceedings instituted in 1850 under and in pursuance of and subject to all of the acts, ordinances and agreements relating to the said Fourth avenue, and to the said railroad therein and resulting in an order of confirmation entered in October, 1853, the city of New York assumed to acquire title to the land within the lines of said avenue, from Thirty-eighth street to the Harlem river, subject, nevertheless, to the right of the Harlem Company, its successors and assigns, to maintain and operate its said railroad therein conformable to lawful public regulation. That by the act of 1872, as and by way of eliminating grade crossings and otherwise improving the avenue, a prescribed statutory grade of the railroad from Forty-fifth street to the Harlem river was provided and established, and provision made for viaducts and over and under crossings, all whereof was carried out and maintained and used thenceforth, and still is. That in April, 1873, the railroad was leased to the Central Company, which entered thereunder, and is now in sole possession thereof. That on April 19, 1892, the Legislature passed an Act entitled "An Act to regulate, improve and enlarge Park Avenue above 106th Street," etc., known as Chapter 339 of the Laws of 1892, and which act has been duly

amended by Chapter 548 of the Laws of 1894, Chapter 594 of the Laws of 1896, and Chapter 613 of the Laws of 1898.

That under and pursuant to section 13 of the Act of 1892 the board therein designated was appointed and organized and thereupon took entire charge of and proceeded in the execution of the work prescribed by said act, and in that behalf made sundry contracts whereunder all requisite structures, both permanent and temporary, have been and are being constructed under the sole supervision of said board and in part at the expense of the city of New York and thereby the provisions of the said act have been carried out and executed.

That all the said changes that have been made were necessary to carry out the provisions of the said acts and necessary to carry into effect the therein prescribed enlargement and improvement of the avenue.

Also pleaded the statutes of limitations and *adverse possession for a period of more than twenty years* (pp. 6–13).

The Trial.

Upon the trial of the issues thus joined plaintiff gave evidence (pp. 21–37) to prove his title to the described premises, and the measure of damages to the usable and fee value thereof claimed by him to be ascribable to the maintenance and use of the railroad structure and train operation; and defendants (pp. 36–46) gave evidence tending to prove the public and *private* consents, agreements, *grants*, and users as *alleged in their said answer*, under all of which they claimed the right as against plaintiff to possess and use the previously and then existing railroad structure and to maintain their train operations thereon.

The general history of the avenue and railroad as presented by the proofs of the parties is in all respects so substantially identical with that presented by the Muhlker

case, recently considered by this court, as to render unnecessary its repetition here.

The original two-track railroad at this point, as maintained and operated from in or about 1835 until the changes made under the act of 1872, was proximately *fifteen feet above* the general surface of the ground, and of the grade of the street after the street was opened in or about 1853 (Defts. Ex. 14, p. 56).

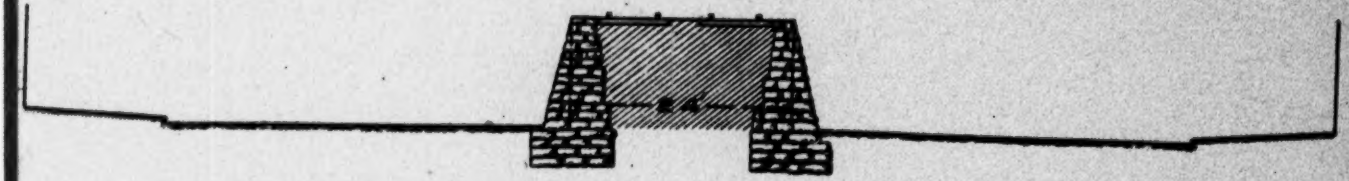
[See opposite page.]

The relative positions of the former four-track railroad structure, and the present one, and that the latter is *clearly within the lines of the former*, are shown by Plaintiff's Exhibit S (page 46). The 1872 structure was bounded upon each side by solid walls ten to *twelve feet in height* above the surface of the avenue and prevented a thoroughfare across the avenue at 114th Street (page 32).

The proofs as to the title of the parties respectively and of the character of railroad structure maintained and used from in or about 1872 until the changes under the enactment of 1892 are, in the main, sufficiently presented by the "Third" and "Fourth" paragraphs of the decision of the trial court, which are as follows:

> "THIRD.—Said railroad prior to August, 1894, "was operated along the centre of said avenue in "front of the plaintiff's premises, on a masonry em- "bankment or viaduct about 3 feet high and about "56 feet wide, and bounded on both sides by parapet "walls of stone, having a height of about 5 feet above "the surface of said avenue.
>
> "FOURTH.—The said defendant railroad companies, "under and by virtue of the charter of the defendant "The New York & Harlem Railroad Company and "the acts amendatory thereof and supplemental "thereto, the various resolutions, consents, ordinances "and acts of the Mayor, Aldermen and Commonalty "of the City of New York, the proceedings taken "by the Mayor, Aldermen and Commonalty of the

SECTION OF PARK AVENUE,
Across south line of 114th. Street,
showing railroad structures from 1872 to 1897.
(see Defendants Exibit 14, between pages 56 & 57.)



SECTION OF PARK AVENUE
Across south line of 114th. Street,
showing railroad structures from 1836 to 1872.
(see Defendants Exibit 14, between pages 56&57.)

"City of New York, commenced in 1850 and con-
"consummated in 1853, the various acts of the Leg-
"islature upon which said proceedings were taken to
"open Fourth (now Park) Avenue from 38th Street
"to 135th Street, Chapter 702 of the Laws of 1872,
"and the acts performed by the defendants thereun-
"der; the lease of The New York & Harlem Railroad
"Company to The New York Central & Hudson River
"Railroad Company, dated April 1st, 1873, and all
"acts of acceptance, user and occupation on the part
"of the defendant railroad companies, and the lapse
"of time and the acquiescence of the plaintiff or his
"predecessors in title, *acquired the right*, without
"liability to the plaintiff, to have, maintain and use
"their railroad and railroad structures as the same
"were maintained and used prior to August, 1894, as
"hereinbefore described."

[See opposite page.]

The evidence to which that finding is imputable is that the railroad company *acquired that right*, not under a deed supposedly lost and granting or purporting to grant the measure of property right exercised, but *under the deed in evidence* specifically authorizing an elevated railroad with the slopes of its embankments occupying the full width of 100 feet.

The location and character of the temporary trestle structure upon which trains were operated during the work of changing the permanent structure in the avenue opposite these premises is shown by defendant's Exhibit 15 (page 57) and described in the decision paragraph "Fifth" (page 16), as follows:

"During the said time, from October 1st, 1894, to
"September 6th, 1897, the trains of the defendant
"The New York Central and Hudson River Railroad
"Company were operated upon temporary structures
"or trestles erected partly over said embankment or
"viaduct and partly between the same and the curb-
"line of said Park Avenue roadway and occupying
"said roadway between plaintiff's premises and said
"old viaduct or embankment."

The judgment directed and entered was that the plaintiff recover the sum of $1,296 damages and the interest thereon and costs, amounting in the aggregate to $1,639.32, and "that the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of their viaduct structure and railroad in front of the plaintiff's premises on the southeast corner of Park Avenue and 114th Street" unless they pay to plaintiff $2,525 for a grant or release of the easements appropriated.

The plaintiff did not except to the above decision nor appeal from the judgment, and hence, in so far as the findings of the trial court are adverse to his contention, they are binding upon him.

The defendants appealed, and upon the review of the judgment in the Supreme Court, Appellate Division, the judgment was in all things affirmed, but by a divided court (page 58), and from this the defendants appealed to the Court of Appeals, with the result that the latter court ordered and adjudged reversal of the judgment and dismissal of the plaintiff's complaint on the merits and remitted the case to the Supreme Court (page 2), wherein judgment was entered accordingly on the said remittitur (page 62).

The matters relied upon for the proceeding in this Court appear in and by the remittitur as aforesaid issued by the Court of Appeals to the Supreme Court (page 1), to wit:

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to Section 1 of Article 14 and the amendments thereto, and of Section 10 of Article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

The Acts of 1892 and 1901.

On the 19th of April, 1892, the Harlem Company was in full life and being, and of the age of something more than sixty years. The New York Central and Hudson River Railroad Company was also in full life and being, and of *the age of something more than twenty years.* During all their lives it had been *one of the conditions of existence* for both of them that when, for any necessary purpose, they took any "real property" belonging to anyone, they must pay for it—and pay for it *before the taking.* By the 19th April, 1892, these provisions had become embodied in the Railroad Law of the State (Chap. 565, Laws 1890), and the Code of Civil Procedure of the State (Chap. 448, Laws 1876). As then existing these provisions were, and still are, as follows:—

Railroad Law of New York.

"ACQUISITION OF TITLE TO REAL PROPERTY.

"§ 7. All real property, *required by any railroad corporation for the purpose of its incorporation,* shall be "deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real "property, or *of any* right, interest or *easement therein,* "required for such purpose, or if the owner thereof shall "be incapable of selling the same, or if after diligent "search and inquiry the name and residence of such "owner cannot be ascertained, *it shall have the right to acquire title thereto by condemnation.* It shall also "have such right in the following cases:

"1. Where title to real property has been acquired, "or attempted to be acquired, and has been found to be "invalid or defective.

"2. Where its railroad shall be lawfully in possession "of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of "running or operating such railroad.

"3. Where it shall require *any further rights to lands or the use of lands* for switches, turnouts or for filling

"any structures of its road, or for constructing, widen-
"ing or completing any of its embankments or roadbeds,
"by means of which greater safety or permanency may
"be secured, and such lands shall be contiguous to such
"railroad and reasonably accessible to the place where
"the same are to be used for such purpose or purposes.

"4. Where it shall require any further right to lands
"or to the use of lands for the flow of water occasioned
"by railroad embankments or structures now in use, or
"hereafter rendered necessary, *or for any other purpose*
"*necessary for the operation of such railroad*, or for
"any right to take and convey water from any spring,
"pond, creek or river to such railroad, for the uses and
"purposes thereof, together with the right to build or
"lay aqueducts or pipes for the purpose of conveying
"such water, and to take up, relay and repair the same,
"or for any right of way required for carrying away or
"diverting any water, stream or floods from such rail-
"road for the purpose of protecting its road *or for the*
"*purpose of preventing any embankment, excavation or*
"*structure of such railroad from injuring the property*
"*of any person who may be rendered liable to injury*
"*thereby.*

"Waters commonly used for domestic, agricultural or
"manufacturing purposes shall not be taken by condem-
"nation to such an extent as to injuriously interfere with
"such use in future. No railroad corporation shall have
"the right to acquire by condemnation any right or ease-
"ment in or to any real property owned or occupied by
"any other railroad corporation, except the right to
"intersect or cross the tracks and lands owned or held
"for right of way by such other corporation, without
"appropriating or affecting any lands owned or held for
"depots or gravel-beds."

Code of Civil Procedure.

"Sec. 3359. WHEN PROCEEDINGS PRESCRIBED IN THIS TITLE TO BE TAKEN.

"Whenever any person is authorized to acquire title to
"real property, for a public use *by condemnation*, the pro-
"ceeding for that purpose shall be taken in the manner
"prescribed in this title."

By sections 3360 to 3374 inclusive "the manner prescribed in this title" is detailed, and is a regular action in the Supreme Court—the only court of *general* jurisdiction in New York, and ending in a judgment.

By Sec. 3375 possession of the property taken can only be had after payment of the compensation awarded by the judgment.

Always as long as those two corporations had lived the *lines* of their railroads had been prescribed *by law* and from time to time changed by *law*. As originally made, those lines must, of course, have passed entirely upon the lands of *other people*—lands not their own—but which they were bound as one of the conditions of their existence to *take* and *pay for*—*pay* for *before* the taking and at the end of a *regular* proceeding—in a *regular* court of *full* jurisdiction into which the owner of the thing taken was regularly brought.

In this condition of things the Act of 1892 was passed. This act, so far as those two companies were concerned, *changed* a portion of their line and required them to run upon a new line—*partly, at any rate, then the property of others.*

By it the State built an elevated structure, which it paid for itself, getting the money for it by its power of taxation, one half from the defendants and the other half from the city of New York; and it commanded and compelled the defendants to put their railroad upon it and run it there, instead of where it had been before. That this was not in the interest of the defendants, but solely in the interest of the public, was held by the Court of Appeals, and is shown by this, that the command of the Congress to have the bridge over the Harlem River raised, required

the change of the former line from 129th Street to the north, *but no other change.* What the act did, however, was to give a much worse railroad line than before. The railroad was required to ascend from 106th Street to 116th Street (one-half mile) at the rate of 40 feet to the mile, and then to *descend* from 116th Street to 129th Street (rather more than a one-half mile), at the rate of 29.6 feet per mile. In other words, the net result to the railroad companies was that they had to pay something like a million of dollars *for the privilege of climbing over a bad hill.* (Section 1, Act 1892; Supp. to Brief, 16.)

The State built the structure and, as has already been said, by its power of taxation it collected the money which the building of it cost, one-half from the railroad companies and the other half from the city of New York.

The railroad companies, as they were commanded by that act to do, put their railroad upon the top of it, and have been running it there since. If they had not obeyed the command, they could not only not have got to their station in the city of New York, but their lives could have been ended.

Certain suits were then brought against them, this one among others; were determined in the Supreme Court of New York in favor of the respective plaintiffs, and went to the court of appeals.

On the eleventh of May, 1901, New York, by her legislature, passed an act which is chapter 729 of her laws of that year, and which will now be copied.

At that time there were before the court of appeals of New York cases, like this one—the *Welde* and *Fries* cases. In the following October those cases were decided against *Welde* and *Fries*, reversing the judgments below, and dismissing the action. (Supp. to Brief, 92, 97.)

We now give the act of 1901.

ACT OF 1901.

CHAP. 729.

"AN ACT conferring jurisdiction upon the court of claims
" to hear, audit, and determine the alleged claims of
" certain owners of real property in New York city
" for damages alleged to have been caused to said
" property by the operations carried out pursuant to
" chapter three hundred and thirty-nine of the laws
" of eighteen hundred and ninety-two.

Became a law, May 11, 1901, with the approval of the Governor. Passed, three-fifths being present.

"The People of the State of New York, represented in " Senate and Assembly, do enact as follows:

"SECTION 1. Jurisdiction is hereby conferred upon the " court of claims to hear, audit, and determine the alleged " *claims* of persons who now own or heretofore have owned " *real property abutting on Park avenue*, in the Borough " of Manhattan, city of New York, between One Hundred " and Sixth street and the Harlem river, or the heirs, ex- " ecutors, administrators, or assigns of said persons, *for* " *damages* alleged to have been *caused to said property by* " *the acts and operations performed and carried out*, pur- " suant to chapter three hundred and thirty-nine of the " laws of eighteen hundred and ninety-two, and the acts " amendatory thereof and supplemental thereto, *in so far* " *as said acts and operations were performed or carried* " *out by, or under the direction or superintendence of, the* "*public board created by said act*, namely, the board for " the Park avenue improvement above One Hundred and " Sixth street, and the court of claims is authorized to " make awards and to render judgments therefor against " the state and in favor of said claimants; provided, how- " ever, that this act shall not be construed as conferring " upon the court of claims jurisdiction to award *any dam-* " *ages for which any railroad corporation or corpora-* " *tions may, either at law or in equity, be liable.*

"SECTION 2. No award shall be made or judgment ren- " dered herein against the state unless the facts proved " shall make out a case against the state, which would

"create a liability were the same established in evidence "in a court of law or equity against an individual or cor- "poration; and in case such liability shall be satisfactorily "established, then the court of claims shall award to the "claimants such sums as shall be just and equitable, and "shall render judgments for the same, notwithstanding "the lapse of time since the accruing of damages, pro- "vided the said claims are filed with the court of claims "within one year after the passage of this act.

"SECTION 3. This act shall take effect immediately."

In the following year the *Muhlker* case was decided, and the court of appeals of New York, speaking by its Chief Judge, then said (Supp. to Brief, 102): "Undoubt- "edly the state had also the power to provide in the act "for compensation to abutting owners, and to apportion "the expense incurred in the acquisition of the easements "destroyed upon the defendants and the city of New "York, as it apportioned the expenses of building the "viaduct and making the other changes in the street; "and it still has the power to authorize ascertainment of "the damages to the abutting owners through its Court of "Claims and to provide for their payment, *and it may* "*well be that it would be equitable for it to do so.*"

It is to be observed that under those acts the court of appeals of New York held the defendants liable for all obstructions to light and air by the building of *stations* (*Dolan* case, Supp. to Brief, 120).

THE FEDERAL QUESTIONS.

The plaintiff in error contended in the court of appeals of New York that the act of 1892 "*and the authority* "*exercised thereunder*" were repugnant to the Constitution (R. 1.)

FIRST POINT.

The plaintiff in error having taken his title before the first of the Elevated Railroad cases has no easement and no case.

The Title.

This case differs from the *Muhlker* case in the following particular:

The plaintiff in error. *Kierns* obtained his title by deed on the twelfth of April, *1882* (R., 36).

This is the evidence. The finding of fact is (R., 25): "The plaintiff is and since April 12, 1882, has been the "owner and in possession of the premises described in "the complaint."

The *Story* case was decided on the *seventeenth of October*, 1882 (*Story* v. *N. Y. El. R.R. Co.*, 90 N. Y., 122, 124).

The only decisions in the courts of New York which were then in force—upon this matter—were the *Kerr* case (People *v.* Kerr, 27 N. Y., 188), and the decision of the Court below in the *Story* (3 Abb. N. C., 478), *and these* are decisions which are to be read into his contract.

SECOND POINT.

The Act of 1892 is not repugnant to the Constitution.

It is to be observed that the Court, in its opinion in the *Muhlker* case, has not *said* that the act of 1892 was repugnant to the Constitution. The opinion does not discuss that matter at all.

In the court of appeals of New York both dissenting judges agreed that the act was constitutional (Supp. to Brief, 109, 116), Judge Cullen saying: "The statute " would simply be inoperative until the company acquired " the necessary land."

I.

The act does not *forbid* compensation nor the giving of notice to the plaintiff.

It does not repeal the Railroad Law. If it did, the effect would be only to revive the old charters of the two companies, which contain the same commands for compensation and notice, with a statement that the act does *not* provide for compensation, *and* does *not* provide for notice—the appropriate answer to both of which statements is to *deny the fact*, and then they devote about 50 pages of print each to showing that plaintiffs have an easement.

Read together with the Railroad Law and the Code of Civil Procedure of New York it not only provides for, but *compels* compensation for the taking of any "easement," and ample notice for the fixing of that compensation.

Read in connection with the law of 1901 it gives payment, *from the treasury of the state*, for all *damages* caused to abutting property by the "acts and operations" of the board created by that act.

The word damages, as the Court has held in *Chicago* v. *Taylor* (125 U. S., 161), and several times since, means the

lessening of the value of the abutting property, which is much more than the plaintiff in error gets by the judgment below, *because* he gets only the lessening of value caused by the loss of *light* and *air*, in other words, *nothing for the running of the trains.*

We challenge counsel to put together ANY *words* which will better give compensation or better give notice.

The act of 1892 was, we submit, certainly not repugnant to *any* part of the Constitution.

And counsel seem to apprehend that condition of things, for ~~they~~, in their brief, they rely, not so much upon the *act* being repugnant to the Constitution, but upon the authority "exercised thereunder" being repugnant to the Constitution.

The phrase of the Constitution is this: No state shall "*pass* any *law* * * * impairing the obligation of con-"tracts."

It is plain that the act of 1892, read in connection with the railroad law; the code of civil procedure and the act of 1901, does *not* impair the "obligation" of any "contract," and, of course, no "authority exercised thereunder" can do so.

That is not the question, although that is the only question which they can raise, *since that is the only question which they raised below.*

The question, as we understand it, is this:

There is a dispute between two beings—human or artificial, it does not matter—about the ownership of a piece of land, or a trespass upon a piece of land. The common law, of course, requires the being in possession of the piece of land to give it up to the true *owner*, and the being who committed the trespass to pay for it to the *owner;* but of course the person who *claims* to be owner, must show that he *is* the *owner*. And thus arises a controversy as to the ownership of the land; but that controversy can never, we submit, come to the Court.

Suppose, now, that a state makes a statute simply declaratory of the common law in this respect. That statute is certainly *not* repugnant to the Constitution. *But does it bring every dispute as to ownership of land to the Court?* Is every railroad act, general and special, repugnant to the Constitution, because there may be a dispute between the railroad company and someone else as to which of them owns a piece of land? Such disputes are common enough. Of course this is a holding either that the Railroad Law of New York *and about every railroad charter in the country is repugnant to the Constitution and void.*

In that event, of course, the plaintiff cannot recover anything but damages for the trespass. The act being void, the railroad companies cannot use the right of eminent domain to take the easements and land necessary for the structure, and consequently the plaintiff cannot recover for their permanent appropriation.

What the Court has just held in the *Muhlker* case is, as we respectfully submit, *not* that the act of 1892 was repugnant to the Constitution, but that the *decision of the court of appeals of New York was repugnant to the constitution.*

Of course there is not any such question here, since no such question was raised below.

THIRD POINT.

A change of judicial decision is not the passage of a law impairing the obligation of a contract, within the meaning of those words as used in the Constitution.

In Yazoo and Mississippi Railroad Company *v.* Adams, 180 U. S., 41, the Court, speaking by Mr. Justice Brown, said:

(p. 44.) "There is no doubt of the general proposition "that, where a contract is alleged to have been impaired "by subsequent legislation, this court will put its own "construction upon the contract, though it may differ "from that of the Supreme Court of the state. The authori- "ties upon this point are very numerous, but they all "belong to a class of cases in which it was averred that, "properly construed, the contract was impaired by sub- "sequent legislation; but, if the sole question be whether "the Supreme Court has properly interpreted the con- "tract, *and there be no question of subsequent legislative* "*impairment*, there is no Federal question to be answered. "*Lehigh Water Co.* v. *Easton*, 121 U. S., 388.

"To sustain our jurisdiction under the second clause of "Rev. Stat., sec. 709, relied upon here, there must be "drawn in question the validity of a state statute upon "the ground of its being repugnant to the Constitution "or laws of the United States; but of what state statute "is the validity attacked in this case? None is pointed "out in the record; none set up in the pleas; none men- "tioned in the opinion of the court."

And at page 46: "Three recent cases in this court are "pertinent in this connection. In *Central Land Co.* vs. "*Laidley*, 159 U. S., 103, an action of ejectment was "brought by Laidley against the land company in a court "of West Virginia. The case turned upon the defective-

"ness of a wife's acknowledgment to a deed of land. The "Court of Appeals of Virginia, prior to the organization of "the State of West Virginia, had in several cases held that "acknowledgments in this form were sufficient; but the "Court of Appeals of West Virginia in this case held it to "be insufficient, and the change of the settled construction "of the statute was charged as an impairment of the con- "tract. This court held that under the contract clause of "the Constitution, not only must obligation of the con- "tract be impaired, but it must have been impaired "*by some act of the legislative power of the State, and* "*not by decisions of the judicial department only.*"

In this same case of *Central Land Company* v. *Laidley* (159 U. S., 103), the Court said (p. 110, 111):

"The same doctrine was stated by Mr. Justice Harlan, "speaking for this court, as follows: 'The state court may "erroneously determine questions arising under a contract "which constitutes the basis of the suit before it; it may "hold a contract void which, in our opinion, is valid; it may "adjudge a contract to be valid which in our opinion is "void; or its interpretation of the contract may, in our "opinion, be radically wrong; but, in neither of such cases, "would the judgment be reviewable by this court under "the clause of the Constitution protecting the obligation "of contracts against impairment by state legislation, and "under the existing statutes defining and regulating its "jurisdiction, *unless that judgment, in terms or by its* "*necessary operation, gives effect to some provision of the* "*state constitution, or some legislative enactment of the* "*State* which is claimed by the unsuccessful party to im- "pair the obligation of the particular contract in ques- "tion.' *Lehigh Water Co. v. Easton*, 121 U. S., 388, 392.

"Many other decisions of this court to the same effect "are cited in that case. See also *New Orleans Waterworks* "*v. Louisiana Sugar Co.*, 125 U.S., 18, 30; *St. Paul &c.*,

"*Railway v. Todd County*, 142 U. S., 282; *Brown v.* "*Smart*, 145 U. S., 452; *Wood v. Brady*, 150 U. S., 18."

And in the same case, is also said:

Page 110:

"It was said by Mr. Justice Miller, in delivering a "later judgment of this court: 'We are not authorized "'by the Judiciary Act to review the judgments of the "'state courts because their judgments refuse to give "'effect to valid contracts, or because those judgments, "'in their effect, impair the obligation of contracts. If "'we did, every case decided in a state court could be "'brought here, where the party setting up a con-"'tract alleged that the court had taken a different view "'of its obligation to that which he held.'" *Knox* v. *Exchange Bank*, 12 Wall., 379, 383.

FOURTH POINT.

The question of the construction of the contract is, therefore, not in the case.

The Court takes jurisdiction of the matter of the construction of the contract, solely to determine whether the statute in question "impairs its obligation" (*Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443). But here is a case where it does not make any difference *which way the contract is construed*, because the statute is not repugnant to the Constitution *in either event*. If the construction is in the *favor* of the plaintiff in error *the statute pays him*. If it be against him, of course he is also paid for whatever he has.

We submit that until the statute is held to be repugnant to the Constitution, there is no question as to what the contract means.

In this case, as we submit, the result is as follows:

The Court takes jurisdiction because of the claim that the Act of 1892 is repugnant to the Constitution. The Court *admits*, in its opinion, by not asserting the contrary and by *not* at all discussing the question *that the Act of 1892 is* NOT *repugnant to the Constitution.*

Nevertheless, it reverses the judgment, upon a question of which, if the Act of 1892 be constitutional, it has no jurisdiction.

See the consequences. Anybody who wants to make a claim against any railroad company simply alleges that the *Railroad Law* is repugnant to the constitution—and upon that allegation brings the case here to the Court. Of course, the Court immediately determines that the Railroad Law is not repugnant to the constitution. Nevertheless it decides the case and reverses the judgment, upon the matter of the simple claim for money.

FIFTH POINT.

Upon the construction of the Acts of 1892 and 1901, read together with the Railroad Law and the Code, the decision of the Court of Appeals of New York is conclusive and will be followed by the Court.

By the Act of 1901, the State is to pay, *provided* the railroad companies are *not* liable. The plaintiff gets his money in any event.

Upon that question as to *which, under New York's own statutes,* PAYS, surely the court of appeals of New York is the proper tribunal to decide.

SIXTH POINT.

The person who did the damage and got the benefit in this case was New York—the State.

Assuming the broad principle, that where any property is taken or *damaged* for a public use it ought to be paid for, we say, *first*, that it is fair that the person who pays for it should be the person who *gets the benefit*, or, at any rate, the person who *does the damage*.

We are neither the one nor the other. The courts below have so found.

It has been found by the trial court and held by the court of appeals that the state made the structure. This is the only thing which obstructs the light and air, and it is only for light and air that the plaintiff in error recovered.

For this, by the act of 1901, New York pays from her own treasury.

> The Court has said in its opinion, that the State by building the structure and then making the railroad companies pay for it, does only by *two* acts what it could have done by *one*, but this can hardly mean that one who is *taxed* and *pays* the tax, is liable for any damages caused by the use of that money by the sovereign to which the money was paid. They—the railroad companies—were compelled to pay but half of the tax—are they then liable for one half of the damage to the plaintiff in error or have they a remedy over against the city of New York for the other half?

Under the opinion of the Court in the *Muhlker* case all the decisions of the court of appeals of New York down to the time of Moore's deed, go into the contract.

These cases, as we submit, hold as follows:—

The legislature, where the fee of a highway is *not* owned

by the abutter, has a right to put a railroad upon it and have that railroad run, without being liable to the abutter. *People* v. *Kerr*, 27 N. Y., 188. This being so, it can put it upon the top of a structure in the street just as well as upon a surface. Even though that structure be unlawful, and take away the abutter's light and air, *the running of the railroad is lawful.* In other words, the plaintiff can recover for the structure, but not for the running of the railroad. This was, we submit, held in the *Story* case. The opinions in that case, carefully distinguishing between the structure and the running of the trains, limiting what is said by the court to the *structure* and expressly and carefully stating that the court did not intend to overrule *People* v. *Kerr*, 28 N. Y., 188, and *Kellinger* v. *Forty-second street R.R. Co.*, 50 N. Y., 206 (Story v. N. Y. El. R.R. Co., 90 N. Y., 122, 146, 155, 159, 160, 161, 169–170).

And it is upon this ground that no recovery is allowed for *noise* in the elevated railroad cases.

A. B. N. Co. *v.* N. Y. E. R. Co., 129 N. Y., 252, 273.

Bischoff *v.* N. Y. E. R.R. Co., 138 N. Y., 257, 263.

The People v. *Kerr*, 27 N. Y., 88, was to restrain the defendants from putting a railroad upon the Seventh avenue in New York. It was brought by the people—and abutting lot owners—and the city was also made a party and took the plaintiffs' side of the case. It was proved, and the trial court found, that the title of the city to the Seventh avenue came, as to a part of it, from condemnation proceedings taken under the act of 1813, already referred to as considered in the elevated railroad cases, and that part was held by the city "in trust, nevertheless, that the same be appropriated and kept open as "public streets forever, and in like manner as the other "public streets in said city are or ought to be."

That as to the rest of the Seventh avenue the city had title, in fee simple, by deeds which expressed the grant to be upon the "*trust that the same be left open as public "streets for the use and benefit of the inhabitants of "said city forever.*" The finding of the trial court has already been quoted—that the railroad "would be a "material interference with, and injury to the use and "enjoyment of the lots fronting" on that street "to "such an extent that the same would constitute a con- "tinuous private nuisance to the owners and occupants "thereof, but for the act of the legislature authorizing "the construction of said road," and there was evidence, not denied, that the value of property "would be depre- "ciated 20 to 25 per cent. should the railroad go into "operation" (Appeal Book, fol. 232; Court of Appeals cases, Bar. Asso. vol. 10 of 1863), and the court, speaking by Mr. Justice Emott, said:

(p. 199) "This is a trust for the benefit of the "public, not of the adjacent proprietors alone, nor "of the inhabitants or citizens of New York alone, "but of the whole people." * * * "The title "thus vested in the city of New York is as "directly under the power and control of the "legislature, *for any public* purposes, as any prop- "erty held directly by the State, or by any public "body or officer." And at page 194: "If the "legislature or municipal authorities, under their "sanction, should construct such a track in a par- "ticular street or road, and while allowing all per- "sons to use that track freely with vehicles adapted "to it, should close the road to every other kind "of travel or use, it would, nevertheless, continue "to be a highway and devoted to a public use. "It is equally so, although its use is restricted to "the vehicles of particular individuals, as for in- "stance of a class of persons licensed to transport "persons or property, or of a corporation having such "privilege or authority, provided, these vehicles are "open to the public under proper regulations, and

"may be used by any and every person without "restriction or limitation, except compensation to "the owners of the vehicle." (p. 193) "Even though" "(it) * * * should be an interference with and injury to "the use and enjoyment of the lots fronting on such "streets, to such an extent that it would be a con- "tinuous private nuisance, if it were not authorized "by law, yet the statute granting such authority is "not unconstitutional, or invalid, because it does "not require compensation for this injury to the "owners of such property." (p. 195) "We are "brought to the simple question, whether, in "constructing and using a railway track with city "cars for passengers, through or over the streets "enumerated in this complaint *the defendants will* "*actually appropriate any property* either of the "City of New York or *of the individual plaintiffs.* "*If property of the latter is taken without com-* "*pensation, even for a public use, the statute is in* "*conflict with the constitution;* and the remedy "sought by them in this action is obviously just and "appropriate to prevent a direct invasion of their "own rights." And Judge Wright says the same thing (pp. 210–212).

This case is deliberately approved in all of the elevated railroad cases, and in *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y., 505, it was deliberately followed and applied to a steam railroad in the city of Syracuse. In that case there was a finding of fact that the railroad occupied "a portion of the plaintiff's said "easement" (light, air and access), and

And the Court of Appeals of New York, said (p. 517):

"It was not intended in the *Story* case to overrule or "change the law in regard to steam surface railroads. The "case embodied the application of what was regarded as "well established principles of law to a new combination "of facts, such facts amounting, as was determined, to "*an absolute* and *permanent obstruction* in a portion of "the public street, and in a *total* and *exclusive use of*

"*such portion* by the defendant, and such permanent ob-
"struction and total and exclusive use, it was further
"held, amounted to a taking of some portion of
"the plaintiff's easement in the street for the pur-
"pose of furnishing light, air and access to his ad-
"joining lot. This absolute and permanent obstruc-
"tion of the street, and this total and exclusive use
"of a portion thereof by the defendant were accom-
"plished by the erection of a structure for the elevated
"railroad of defendant, which structure is fully described
"in the case as reported. The structure, by the mere
"fact of its existence in the street, *permanently* and *at*
"*every moment of the day* took away from the plaintiff
"some portion of the light and air which otherwise
"would have reached him, and in a degree very appreci-
"able, interfered with, and took away from him his
"facility of access to his lot; such interference not being
"*intermittent and caused by the temporary use of the*
"*street by the passage of the vehicles of the defendant*
"*while it was operating its road through the street*,
"but caused by *the iron posts* and by the *superstruct-*
"*ure* imposed thereon and *existing for every moment of*
"*the day and night. Such a permanent, total, exclu-*
"*sive* and *absolute appropriation* of a portion of the
"street as this structure amounted to, was held to be
"*illegal* and wholly beyond any legitimate or lawful use
"of a public street. The taking of the property of the
"plaintiff in that case was held to follow upon the *per-*
"*manent* and *exclusive nature* of the appropriation by
"the defendant of the public street or of some portion
"thereof. If that appropriation had been held legal,
"any merely consequential damage to the owner of the
"adjoining lot, not having any title to the street, would
"have furnished no ground for an action against the de-
"fendant. It was just at this point that the disagree-
"ment existed between the members of this court in the

"*Story* case. The judge who wrote one of the dissenting "opinions did not think that the facts presented any "different principle from that of an ordinary steam sur- "face railroad operating its road through the streets of "a city under the authority of the legislature and of the "municipality, in a case where the adjoining lot owner "did not own the fee in the street. The character of "the structure, and all the facts incident thereto, were "regarded by him as simply resulting in an additional "burden upon the street, somewhat greater in degree it "is true than a steam surface railroad, but still it was "such a use of the street as the legislature might permit, "and the legislature having in fact granted it such "power, the use of the street was, therefore, legal, and "the defendant was not responsible for the incidental "damage resulting to one whose property was not in "fact taken within the meaning of the constitutional "provision, and the defendant did him, therefore, no "actionable injury. The other dissenting judges were of "the same opinion.

"A majority of the court, however, saw in the "facts existing in that case what was regarded as a "*plain, palpable and permanent misappropriation* of "the street, or some portion of it, to the *exclusive use of* "*the defendant corporation,* and as resulting from it the "court held that there was a taking of property belong- "ing to the plaintiff without compensation, which no "legislature could authorize or legalize. But this "taking, *it cannot be too frequently or strongly* "*asserted, resulted from the* ABSOLUTE, EXCLUSIVE "*and* PERMANENT *character of the appropriation* "*of the street by the structure of the defendant.* "There is no hint in either of the prevailing opinions "in the *Story* case of *any intention to interfere with* "*or overrule the prior adjudications in this state* "*upon the subject now under discussion, as to the steam*

"*surface railroads.* In the *Story* case it was argued "that no real distinction in principle existed between a "steam surface and an elevated railroad resting on such "a structure as was proved in that case. This court, "however, made the distinction, and the two prevailing "opinions are largely taken up with arguments going to "show the distinction was obvious, material and impor- "tant, and was so real and tangible, in fact, as to call "for a different judgment than would have been proper "and appropriate in the case of the ordinary steam sur- "face railroad, such as the *Drake* case was." * * *

I.—IT IS NATURAL AND UNIVERSAL LAW THAT DAMAGES SHOULD BE PAID FOR BY THOSE FOR WHOSE BENEFIT THE DAMAGE WAS DONE. TO THIS PRINCIPLE OF UNIVERSAL LAW THE WORLD IS GRADUALLY WORKING UP.

In the days of the good Queen Bess, if Her Majesty wanted anything Her Majesty *took it*, and paid for it if she so pleased.

In the first Constitution of New York the power of eminent domain is not even mentioned, and it is now mentioned only for the purpose of limitation. All constitutions now contain the provision that private property shall not be taken for the public without just compensation. Some constitutions contain the provision that "private property shall not be taken *or damaged* for "public use without just compensation." The Constitution of New York does not contain the latter provision, nor did it at the time when the elevated railroad cases were passed. It so happened that the damage done by

the elevated railroads to private property was enormous, and since those roads, though for a public use, were run entirely for private profit, it was only fair and just that the damage done should be paid for by the companies—it being elemental that no public improvement should be encouraged or permitted unless it will, at least, pay for the damage which it causes.

That this was the true and sole ground for the elevated railroad cases is said by Court itself, and we now quote its text.

In *Bohm* v. *The Metropolitan Elevated Railroad Company*, 129 N. Y., 576, the Court of Appeals of New York, speaking through Judge Peckham, said (p. 587):

"The plaintiffs own no land in the street. Their own-
"ership of the land is bounded by the exterior lines of
"the street itself. Hence when, under legislative and
"municipal authority, the railroad structure was built,
"it was supposed by many there was no liability to
"abutting owners, because no land of theirs was taken,
"and any damage they sustained was indirect only, and,
"therefore, *damnum absque injuria*. When the courts
"acquired possession of the question, *and it was seen*
"*that abutting land which before the erection of the*
"*road was worth, for instance, ten thousand dollars,*
"*might be reduced to a half or a quarter of that sum*
"*in value, or even rendered practically worthless by*
"*reason of the building of the road*, IT BECAME NECES-
"SARY TO ASCERTAIN IF THERE WERE NOT SOME PRIN-
"CIPLE OF LAW WHICH COULD BE RESORTED TO IN ORDER
"TO RENDER THOSE WHO WROUGHT SUCH DAMAGE LIABLE
"FOR THEIR WORK. It has now been decided that,
"although the land itself was not taken, yet the abutting
"owner, by reason of his situation, had a kind of prop-
"erty in the public street for the purpose of giving to
"such land facilities of light, of air and of access from
"such street. These rights of obtaining for the adjacent

"lands facilities of light, etc., were called easements, "and were held to be appurtenant to the land which "fronted on the public street. These easements were "decided to be property, and protected by the Con- "stitution from being taken without just compensation. "It was held that the defendants, by the erection of their "structure and the operation of their trains, interfered "with the beneficial enjoyment of these easements by the "adjacent landowner, and in law took a portion of them. "By this mode of reasoning, the difficulty of regarding "the whole damage done to the adjacent owner as conse- "quential only (because none of his property was taken), "and, therefore, not collectible from the defendants, was "overcome. The interference with these easements be- "came a taking of them *pro tanto*, and their value was to "be paid for, and, in addition, the damage done the re- "maining and adjoining land, by reason of the taking, "was also to be paid for, and this damage was in reality "the *one* great injury which owners sustained from the "building and operation of the defendant's road. For "the purpose of permitting such a recovery, the taking "of property had to be shown."

But in this instance the defendants are NOT *the parties benefited nor did* THEY *do the damage.*

The facts as to this have been already stated, but the main facts are now re-stated.

The defendants had their tracks upon a solid structure consisting of *the solid earth*—in this place a cut—of course *lasting forever without* repair. They are now upon a bridge of iron and steel—liable to rust and disintegration —and sure to need, in the future, continual and expensive repair, which, though it be that *now* they *do not* and *have not the right* to make, it is quite possible that in the end *they may be compelled to make.*

They had a level line. They now have to climb over—both up and down—a bad hill.

The change was not for *their* benefit—but distinctly to their detriment (Court of Appeals of New York, R. 167, 165, Plaintiff's brief, p. 3), and for it they were obliged to pay a million of dollars.

The damage was done for the *benefit* of *the* PUBLIC—and *the* PUPLIC—*ought to pay for it.*

In the Court of Appeals of New York, Chief Judge Parker delivering its judgment in this case, said: (R. 170) —"Undoubtedly the State * * * "still has the "power to authorize ascertainment of the damages to the "abutting owners through its court of claims, and to pro- "vide for their payment, *and it may be well that it would "be equitable to do so.*" In 1901 the state made the law chapter 729 of the laws of that year which is printed in ~~the Appendix to~~ this brief ~~(Appendix I),~~ and by that law it gave (2 Laws 1901, 1787) jurisdiction to the court of claims to "hear, audit and determine the *alleged claims*" of persons owning "real property abutting on Park ave- "nue *for* DAMAGES *alleged to have been caused* TO SAID "PROPERTY by the acts and operations performed" by the board created by chapter 339 Laws 1892—"and to "render judgments therefor against the state and in "favor of said claimants."

This means diminution in value.

Chicago *v.* Taylor, 125 U. S., 161.

2. THE STRUCTURE HAS BEEN PAID FOR BY TAXATION, AND THE PLAINTIFF CAN BE PAID BY TAXATION—OF OTHERS, OR EVEN OF HIMSELF. THIS COULD NOT BE UNDER THE RULE OF THE ELEVATED CASES.

20 Jun. '92. In Bohm *v.* M. E. R. Co. (129 N. Y., 576), the Court of Appeals of New York, speaking by Judge Peckham, said (p. 586):

"Before entering on a discussion of these matters I "think it proper to say that I should hesitate to admit

"the correctness of the claim made by defendants that "*where private property is taken by a mere business* "*corporation, as for a public use under the granted* "*power of eminent domain, the legislature could provide* "*that such property could be paid for by benefits accru-* "*ing to the landowner's adjacent property consequent* "*upon the taking.* This is the case in regard to munici- "pal corporations where land is taken for a public street, "or other public and municipal purpose, and where the "benefits arising to the adjacent lands of the owner "whose property is taken may be set off against the "value of the land taken. So in the case of property "taken by the state for canal or other public purposes, "where the owner of the land was frequently paid its "value by the benefits received to the adjacent land "not taken. The principle underlying these cases is, "however, the right of the muicipality or state to tax "the owners of the land left, in order to pay for the land "taken, on the ground that they are specially benefited "by the taking, and hence should be specially taxed for "the payment of the land. The case of *Genet* v. *City of* "*Brooklyn* (99 N. Y., 296) is no authority for a contrary "view, for I think it supports that which I have sug- "gested. *A mere trading or business corporation has* "*no power of taxation*, AND THE STATE COULD NOT DELE- "GATE SUCH POWER TO IT. If *such* company desire "another's property *it must pay a just compensation* "*for it, and that compensation would not consist* IN ITS "DOING THE OWNER SOME BENEFIT UPON HIS REMAINING "PROPERTY."

The object of this point and the above quotations is simply to try to satisfy the Court that—

1. By the elevated railroad cases the *structure* was the thing paid for and not the running of the trains—and that distinction, we submit, is also made in the Court's opinion in the *Muhlker* case—

2. The the finding in this case is the same—only damage for *the structure*.

3. That the defendants are not liable *for the structure*, but the *State* is.

4. And New York having provided for the payment out of her own treasury for the damages caused by *the* structure in case the railroad companies were *not* liable for them, and the court of appeals of New York having held that the railroad companies ARE *not* liable, the judgment is right, and should be affirmed.

SEVENTH POINT.

The judgment is so obviously maintainable upon the independent ground adjudged by the State Court, not involving a federal question, that the writ of error should be dismissed or the judgment affirmed.

The plaintiff Kierns, as is alleged in his complaint, acquired his described premises in April, 1882. The railroad structure as it existed in Park Avenue at the time of his purchase and down to the time of the changes under the act of 1892, and which the trial court adjudged the defendants had acquired the right to main-

tain, is shown by the map or sectional view thereof appearing upon the opposite page.

It stands undisputed that the muniments of title under which the defendants acquired the right to the exclusive possession and use of this land by and for that railroad structure embraced, among others, the deed purporting to grant the fee of the center 24 feet, with the right of occupying the entire 100 feet, then width of the avenue, with embankments or excavations which the railroad company might deem its corporate use required.

The line of reasoning which would lead to the conclusion that a title evidenced by or growing out of such exclusive occupancy and use of the land would be inadequate to justify the occupancy and use of the same land with a higher railroad structure, would, by the same rule of logic, lead to the conclusion that one having entered under color of title in fee and possessed for the statutory period of limitation a tract of land with a one-story building thereon, could not, by the title thus acquired, and evidenced, justify a subsequent possession of the same tract of land with the maintenance of a two-story building thereon.

The right of maintenance and use of an elevated structure was specifically provided for in the grant. The common-sense interpretation of the right acquired under that grant is that stated by O'Brien, Judge, in the *Welde* case (168 N. Y., 597–599): "It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the 100 feet."

If it may be urged that the maintenance of the railroad structure as now elevated is not by reason of railroad necessity, but by reason of necessity of enlargement of the street by occupancy and use for it of the land theretofore occupied exclusively by and for the railroad so

much the stronger becomes the reason for the act of 1901 and for the observation of the Court of Appeals that it might be equitable for the State to provide compensation from its treasury.

Moreover, it distinctly appears by what is said by Bartlett, *J.*, writing for the Court of Appeals in the Ketcham case (177 N. Y., 247, 251), that that court did not regard these complainants as at all disentitled to compensation for their easements actually taken by reason of anything contained in or wanting in the 1892 enactment, and that it did not regard mere absence of specific provision in that enactment for compensation as any limitation upon the general provisions of the law affording a remedy of and method of award of such compensation. That language is:

> "In Dolan *v.* N. Y. & Harlem R.R. Co. (175 N. Y., 367), Judge Haight, writing for the court, said (p. 371): 'If the station-houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor.'
>
> This language is, in general terms, an indication of the rule of damages to be applied in these station-house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases.
>
> If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded."

The evidence before the trial court established defendants more than twenty years' continuous, open, hostile and exclusive possession of this railroad ground under color of all the muniments of title mentioned in para-

graph "Fourth" of the decision, and which included a deed in and by which Benson, the grantor, purported to

> "give, grant, bargain, sell and demise * * * all that certain piece of land * * * being part of one of the avenues laid out on the map of the City of New York as the Fourth Avenue, * * * and is bounded and described as follows, viz.:
>
> Northerly by the old road leading from Harlem to Harlem lane and McGown's pass; southerly by land of Mrs. Margaret McGown, and east and west by lines drawn parallel to the center line of the 4th avenue at the distance of twelve feet on each side thereof, * * * and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted, as may be necessary to support their work, not, however, extending beyond the width of the avenue." (R. 40.)

That possession excluded plaintiff and his predecessors in title and all other persons and public street uses from the sixty-foot strip of land. As against plaintiff and his predecessors in title that possession was ascribable to this deed and constituted adequate notice of the claim of the property right which that deed purported to grant.

The rule is elementary that adverse possession for the period of statutory limitation under claim of the title which a deed purports to grant makes equally perfect title to the property right purported to be granted.

[See opposite page.]

The Conabeer Case.

The language of the grant of the above deed is identical with that interpreted, construed and adjudicated by the courts of the State in the *Conabeer* case in 84 Hun, 31, and affirmed 156 N. Y., 474.

The railroad structure, the existence and use of which was there complained of, is described in 84 Hun, page 36:

"in the center of said avenue crossing One Hundred

and Fourth Street and in front of the premises of the plaintiff, a viaduct about fifty-six feet wide and thirty-three feet high, retained by walls of masonry running parallel with the lines of the avenue."

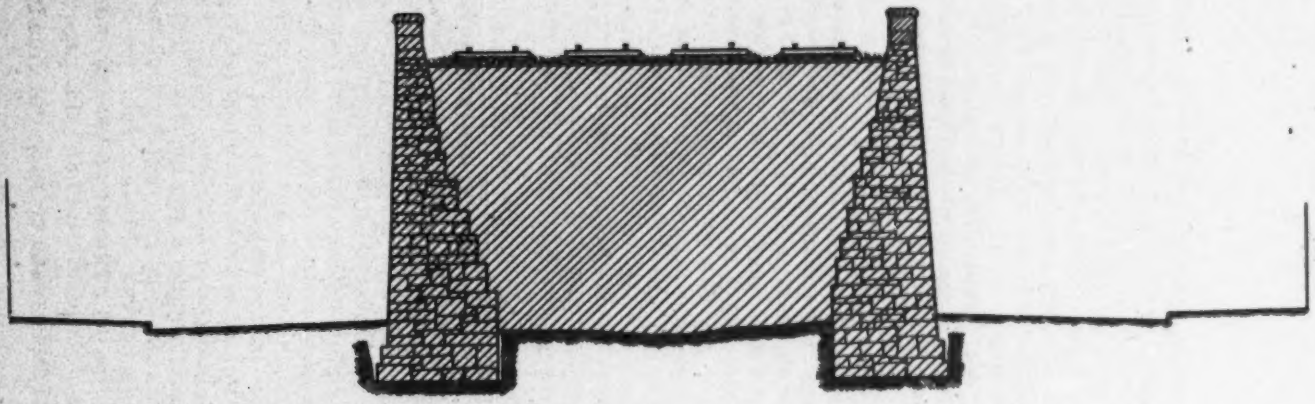
[See opposite page.]

Concerning this deed, Follett, *J.*, writing for the Supreme Court, General Term, at page 38 (84 Hun), said:

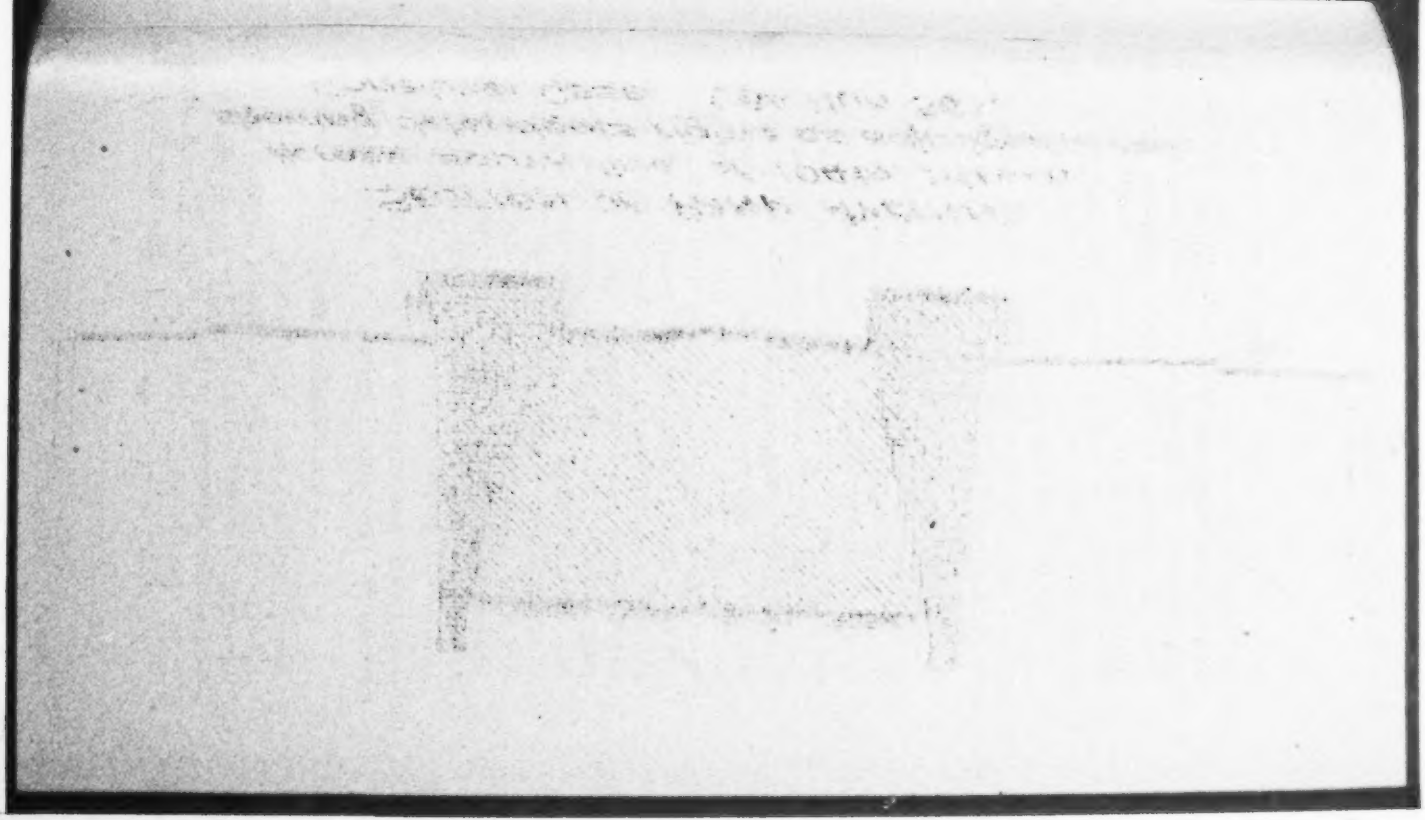
"By the terms of this deed the grantee was authorized to construct a railroad on the land conveyed, with the right of extending the embankment on which the rails were to be laid to the exterior lines of the avenue. At the date of this conveyance the avenue was 100 feet wide, and on each side of the land conveyed and within the avenue, there was a strip of land thirty-eight feet wide the title to which was not conveyed, but the right to cover these strips with an embankment was expressly granted. The embankment as now constructed is fifty-six feet wide, covering the land conveyed by Mrs. McGown, and a strip sixteen feet wide on each side of the strip granted by her, which is twenty-two feet less on each side of the strip conveyed than the defendants, by the grant, were authorized to use. By the conveyance, the grantee was authorized to construct a railroad on the subject of the grant, and, if necessary, to occupy the whole width of the avenue adjacent to the grantor's remaining land."

And upon the review of the case on appeal, Martin, *J.*, writing for the Court of Appeals, says (166 N. Y., 482):

"It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the



SECTION OF PARK AVENUE,
Across South line of 104th. Street,
showing defendants rights as adjudged in the
Conabeer Case (84 Hun 36).



right to slope its embankment to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance."

(p. 484):

"It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted."

(p. 486):

"It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose,

which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the centre of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she nor her grantees can assert the right thus released."

(p. 488):

"This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities."

(p. 490):

"Under the circumstances of this case, it is manifest that the abutting owners who derived their title from Mrs. McGown subequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendant's viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth Avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants."

(p. 491):

"The judgment" (in favor of defendants), "should be affirmed.

All concur except Parker, *Ch. J.*, not sitting."

It cannot be said of the above case or of the judgment therein that

> "The public interest, therefore, is made to much of. It is given an excessive, if not a false quantity."

The case did not involve any question of public interest, and did not present any question of public interest, and therefore the public interest was not either made too much of, or given an excessive or false quantity. And, moreover, it established that the maintenance of a solid embankment, protected by substantially perpendicular retaining walls, constituting a structure of equal width and greater height than the one here complained of, took no property from the plaintiff. The rights of the defendant railroad companies in the case at bar are of equal scope with those in the *Conabeer* case, when dealt with by application to them of the same rules of local property law.

The reason pointed out as above, upon which that case was said to be "clearly distinguishable from the elevated railroad cases upon which the plaintiff relies" was that "in those cases there was no grant" * * * while here "the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities."

The judgments of the Court of Appeals in the *Fries* case, as also in the cases which have followed it, including the *Muhlker* case and the case at bar, included in the grounds upon which they were distinguished from the elevated railroad cases, the ground which alone and of itself was adjudged sufficient in the *Conabeer* case.

NOTE.—The Conabeer property was southerly of the 1892 improvement, and the structure complained of was built under the act of 1872. It follows that when the Court of Appeals held, as it did in this and the *Fries* and *Muhlker* cases, that the structure and use complained of were within the property right which the railroad company had ac-

quired, it was but applying the same rule of law which it had previously announced without reference to the 1892 enactment, and not any new rule or doctrine founded upon or formulated to sustain that enactment, or any authority exercised thereunder.

Revision and reversal of the holding of the State Court in this respect, then, is obviously not merely the reversal of the announcement of those courts based upon and in view of the 1892 enactment, but of the rule of local property law which antedated that enactment.

The Elevated Railroad Cases.

In the elevated railroad cases the defendants did not and could not set up any claim of having acquired from the abutting owner any property right in addition to that which had been reserved or acquired by the public for public street purposes. The railroad companies stood upon the consents granted to them by the public authorities, and upon these contended that the maintenance and operation of their railroads were consistent with and, indeed, a part of the public street use reserved or acquired by the public, and hence they were not liable.

The ground upon which *Story* and subsequent complainants were adjudged entitled to recover was that this contention of the railroad companies was untenable. The field of the inquiry which led to that determination did not at all involve the question whether complainants had parted with any property right or contract right other than and in addition to that reserved or acquired by the public for public street uses, because there was no foundation for any such claim, nor was it asserted. When Story purchased his premises he found the street upon which they abutted an open street, just such as was called for by the terms of the grant under which the street was created and abutters' rights vested. In reliance upon his

asserted right to have that condition continue, he alleged the threat and intent of the defendant railroad company to build its elevated road, and prayed injunction to restrain it from so doing.

Altogether different are the facts in the case at bar. When this plaintiff purchased the premises abutting upon Park Avenue described in the complaint, he found those premises abutting upon an open street or avenue of the width of 40 feet, and next to that a 60-foot strip of land occupied and used solely and exclusively for railroad maintenance and operation, and upon the opposite side of that strip of land another like open street or avenue, upon which the premises opposite to and 140 feet distant from his abutted. Upon his negotiation for the purchase of the premises described in the complaint, he was charged with notice and presumably had actual knowledge of the occupancy and use of that 60-foot strip of land. The rightfulness of that occupancy and use was open to inquiry, and, it is but fair to presume, was the subject of such inquiry as plaintiff saw fit to make concerning it.

In the language of Martin, *J.*, the *Conabeer* case (156 N. Y., 474), at page 493, "he purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendant's grants. With that knowledge, presumably, she (he) made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendant's railroad, and hence lost nothing by being deprived of any of her (his) otherwise appurtenant easements."

Inquiry upon that subject at that time would have and presumably did afford him the knowledge which the evidence in this case disclosed, that the public street had never been opened upon or over or occupied the same ground as the railroad; that the street had from its inception consisted of the public highway upon either side of

the railroad and not of the railroad ground. Whereas *Story* in his purchase had every reason to suppose that he was acquiring the same property right and the same measure of property right and contract right which the deed of the City under which the street was created, and under which the rights of his predecessor in title, the immediate grantee of the City, were vested; and that such was the character and measure of his property and contract right stood undisputed; in the case at bar this plaintiff at his purchase had open and notorious information that the rights of his grantor were not the equivalent of those which vested in the immediate grantee of Poillon, plaintiff's remote predecessor in title.

The question which this case presented was not at all that of the right of the State or the railroad company, or both, to maintain an elevated viaduct structure with a railroad thereon, founded merely upon the right to operate a surface railroad in the street, such as the *Kerr* case and *Fobes* case involved.

The earth surface in and upon which those railroads existed and were operated was a part of the open public street, the same identical parcels of ground used in common by both the railroad company and the public. The passing of railroad engines, cars and trains over the tracks differed in the degree but not in the character of their interference with the general public use of the same portions of the street's surface, from that of other vehicles passing over it; and the determination and adjudication that such railroad use is not inconsistent with street use is founded upon the fact that the one use does not exclude the other.

On the other hand, the case at bar does not at all involve the question of the right of existence and operation of an elevated railroad structure upon and over a theretofore existing open public street, for the operation of a railroad thereon which had theretofore used the street, or

the same portion thereof in common with the general public, but the question is as to the right of existence and use of such railroad structure over the strip of land thereunto rightfully, as against abutting owners, occupied and used by and for the railroad to the exclusion of every other occupancy and use.

Obviously the doctrine of law which sustains the right of existence and use of an elevated railroad structure over the same strip of land theretofore rightfully occupied and used exclusively for railroad purposes, constitutes no determination of the question whether a railroad such as the *Fobes* case dealt with, might be placed upon an elevated viaduct structure over the theretofore open street, without liability to abutting owners; nor does it at all involve the doctrine of the elevated railroad cases holding such structure inconsistent with the open street to which the complainants in these cases were adjudged entitled.

This 60-foot strip of land is now a part of the public street by virtue of the act of 1892. As against this plaintiff the trial court has adjudged that it was the right of the railroad company to occupy this land to the exclusion of street uses, as it had done prior to the act of 1892, and hence that, but for that enactment, it was not the right of the plaintiff to have an open street, or any street, over that strip of land.

The Lewis Case.

The contention on behalf of complainant in the *Fobes* case was that the rule of the elevated railroad cases was controlling as to the railroad and its use of which he complained.

So here the similarity of conditions presented by this structure and its use to that of the elevated railroads complained of in the Story and Lahr cases, at first blush, seemed to favor the theory that all contentions

and controversies in respect thereof were within and governed by the principle of the adjudged elevated railroad law. It was with seeming difficulty that the fact that the same ground was never before used for both street and railroad purposes, constituted a factor in the solution of the question of easement rights in and over the railroad ground which by the Act of 1892 became, *in fact*, a part of the street.

The court recognized some of the distinctions between the ordinary elevated railroad case and that regarding this structure in the Lewis case, but was, nevertheless, as we respectfully submit, led into quite obvious error by the influence of the natural leading of the consideration above mentioned. The right controverted in the elevated railroad cases was that of the construction and use of the elevated railroad in a theretofore free, open street. The character of occupancy and use of the street which the elevated railroad contemplated and effected was such as might with some measure of reason and propriety be termed a mere easement or incorporeal hereditament, the right of which as against abutting owners might be the subject of express or implied grant, and if the latter, might, with a measure of propriety at least, be characterized as a title by prescription; that is to say, it involved a unity of use of the street as an entirety by the railroad, its stations and approaches, and by its passengers as such, coincident with the use of the same street by the general traveling public in the ordinary public street uses. When, as the result of the act of 1892, the center strip of land was included in and made a part of the open traveled street or avenue, with the railroad bed above it, supported by columns resting upon masonry imbedded in the soil of the street, the conditions created were very like those existing in the elevated railroad avenues. In this very particular, however, the former railroad structure, the occupancy of the ground covered by it, and of the soil of

that ground exclusively for railroad purposes, and the structure maintained in such manner as to exclude the public from the railroad ground, differed in character entirely from the occupancy and use of the avenues by the ordinary elevated railroad, and from the occupancy and use of this avenue by the now existing Park Avenue viaduct structure.

Title by prescription is not recognized upon either principle or authority as the title upon which to rest a right of sole and exclusive possession of, and the maintenance of fixed physical structures upon, a tract or strip of land. The exclusive possession and use is not the exercise of a mere easement right, or the character of evidential fact tending to show that incorporeal right; while it includes the right of passage upon and over the strip of land, it includes also very much more than that, in that it is the physical possession of the land of the character designated in the law as "adverse possession."

When the plaintiff purchased his land abutting this avenue, then of the open width of 40 feet, upon which his premises abutted, and saw the adjoining 60 feet devoted to and used exclusively for railroad purposes, this was not merely notice of a right to operate a railroad upon the street surface, such as the *Fobes* case dealt with, but a right to possess the lands to the exclusion of every other occupancy and use. It was such notice as to put him upon inquiry concerning the right of the railroad company to do what it was there openly doing in that regard. It was a notice of adverse possession of the land, and not of a mere right to move engines, cars and trains over it. That inquiry pointed to the record of the deed to which the possession was to be imputed as explanatory of it; it led to evidence of a possession continued for upwards of 50 years, during which the ground occupied by the railroad had never been used by the public in common with the railroad. Such inquiry led to the record of

the deed explanatory of that exclusive possession, and which purported to grant and release, not merely the right to build, maintain and operate a railroad upon the surface of the avenue, or upon the surface of the ground, but specifically to occupy with its embankments or excavations the full width of 100 feet. It was a present and perpetual release of all damages resulting to premises abutting the avenue, not merely by a railroad upon the earth's or avenue's surface, but elevated or depressed, as it might be, by embankment or excavation of the width of 100 feet.

It is no answer to this to say that the deed when made did not carry good title because the grantor therein had at this particular point already parted with his title. The deed constituted the color of title under which the railroad company from 1835 to 1897 maintained its continuous, hostile, open and exclusive possession of so much of the property described in the deed as was requisite for its railroad structures as within that time maintained and used. The character of deed which that possession constituted notice of to plaintiff was not that of a property right which would justify maintenance of a railroad upon and over ground to be used by it and the general public, but of a deed vesting or purporting to vest the right to such exclusive possession as was there exercised.

One of the errors which intervened in the *Lewis* case, and which was corrected in the *Fries* case, was that of a proper recognition of the source and character of title, or color of title, upon which was maintained the exclusive possession by the railroad, which the trial court in each of the cases adjudged the defendants entitled to. The character of the title to which that rightful exclusive possession was ascribed in the *Lewis* case, to wit: that of title by prescription, did not embrace proper cognizance of the nature of title requisite to justify that which the court found to be justified. The court in the *Lewis* case con-

ceived, and went upon the hypothesis, that because the railroad company had the consent of the City to the building of its road in the laid-out but then unopened avenue, therefore it could not be permitted to claim title under its deed from Benson produced in evidence, but nevertheless might be permitted to claim title under a deed supposed to be lost; and, upon that hypothesis, it was held that, as between the railroad company and the City, the railroad possession was presumably under and in subordination to the title of the City; but that as against the abutting owner it was hostile and of character to evidence the acquirement of title; but the title presumed to have been acquired, instead of that which the deed put in evidence purported to grant, was that under a deed presumably lost, and presumably carrying only such property right as was requisite for the maintenance and use of the successive railroad structures which existed prior to the present one.

The charter of the Harlem Company obviously contemplated a railroad which should exclude the public from its ground, and, instead of proceeding upon the hypothesis of the *Kerr* and *Fobes* cases, that if the railroad were located within the bounds of a public street the public consent would constitute sufficient authority for their maintenance and use of the road, the charter, on the contrary, specifically and peremptorily compelled the railroad company to acquire the property not donated for its right of way, and for that purpose gave it the power of condemnation. The railroad company did not proceed upon the hypothesis that public consent constituted sufficient authority for the building and maintenance of its road where it was located. On the contrary, it proceeded to acquire, by condemnation in some instances, and by deeds in others, the title of and for its right of way, in obedience to the command of its charter. Having gotten these,

it proceeded to build its road, and had it in operation in or about 1835.

The character of its possession is only properly ascribable to such character of deed or muniment of title as would be adequate to authorize and warrant such character of possession. A deed purporting merely to grant the right of passage of engines, trains and cars over the surface of the ground until the street was opened, and upon the surface of the street after that, would not have been sufficient to authorize the maintenance and use of railroad structures which excluded the grantor and the public from the ground occupied by them. Any deed fairly within the contemplation of a title or grant by "prescription" would constitute no sufficient warrant for that character of possession. The railroad structure, and use of it, as plaintiff saw them prior to his purchase of the premises described in his complaint, was notice to him of the title which gave a right of possession to the exclusion of all other occupancy and uses, and which included every beneficial right and interest in the land. When this case went to the Court of Appeals, and that court found in the record the finding of the trial court as set forth in its decision, and searched the record for the nature and character of the evidence on which that finding was founded, that record showed it to be based, not upon title by prescription, or a deed supposedly lost, but upon the muniments of title proven, including the deed set forth in the evidence as constituting the color of title under which the exclusive possession had been maintained, and which the trial court had found to be rightful.

CASES UNDER ACT OF 1892.

The ground upon which the trial court held the plaintiff disentitled to recover in respect of the maintenance and use of the railroad structure existing at the time of the

1892 enactment was, not that there had not been a property right or contract obligation which, if still in force, the maintenance and use of that structure would be inconsistent with; butthat by the muniments of title set forth "the said defendant railroad companies acquire the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894, as hereinbefore described;" in other words, that the property right or contract obligation upon which plaintiff relied had been released to and acquired by the railway companies.

This determination of the trial court was founded upon its interpretation, construction and legal view of all of the facts, circumstances, grants, express and implied, and other oral and documentary evidence before it.

The adjudication of the trial court was that the property rights which the railroad companies had acquired from the predecessors in title of plaintiff, and from plaintiff, were such as entitled them to the exclusive occupancy and use of that strip of land for railroad purposes without liability to the plaintiff.

The ground upon which the trial court concluded and determined that the existence and use of the elevated structure constituted a trespass upon plaintiff's property rights, was, not that plaintiff was entitled, as against the railroad companies, to have this strip of land opened for ordinary street uses, either relieved of the railroad or otherwise, for the court had expressly found to the contrary; but, upon the ground that the right which the railroad companies had acquired to occupy and use this 60-foot strip of land exclusively for railroad purposes was not such as could justify the maintenance and use of an elevated railroad structure upon and over the same strip of land, which the court had determined that the railroad companies had acquired the right to occupy and use for

railroad purposes to the exclusion of all other occupancy or use.

When by the appeal of defendants, first to the Supreme Court, Appellate Division, and second to the Court of Appeals, the jurisdiction of those courts was invoked to review and determine the accuracy of the judgment of the trial court in adjudging these property rights as aforesaid acquired by the railroad companies as insufficient to justify the maintenance and use of the existing railroad structure, those courts in turn were called upon to interpret, construe and adjudge the legal effect of, not at all the contract obligation under which easement rights had become vested in plaintiff, or her predecessor in title, but rather and solely the legal effect of the instruments, grants, express and implied, and other muniments of title which had been acquired from them by the railroad companies, and which the trial court had determined was sufficient to justify the maintenance and use of the 1872 railroad structure, but insufficient to justify the maintenance and use of the 1892 railroad structure.

The result of that review by the Court of Appeals was the determination that the property rights which the railroad companies had acquired from and against plaintiff and his predecessors in title, and which the trial court had found and adjudged sufficient to justify the maintenance and use of the 1872 railroad structure, were sufficient to justify the maintenance and use of the 1892 railroad structure.

In the consideration and discussion which led to the conclusion by and upon which these cases were distinguishable and distinguished from the ordinary railroad cases, the State courts had no occasion to examine with particularity the question of similarity or of difference between the original property rights or contract rights of the parties in the one class of cases as compared with those in the other, because the controverted question pre-

sented did not relate to original conditions, but to subsequent changes or modifications thereof. In the ordinary elevated railroad cases the abutting owners had parted with nothing of either property right or contract right except that which had been granted or taken for public street uses; while in these cases it was equally undisputed that the railroad companies had acquired from the abutting owners, and the abutting owners had parted with some property rights and contract rights other than and in addition to those granted or taken for public street uses, and the question before the court was as to the extent of the rights which the railroad companies had thus acquired, and these plaintiffs and their predecessors in title had parted with. Thus, in the *Fries* case (169 N. Y., 270), O'Brien, *J.*, writing for the Court of Appeals, having in the earlier portion of his opinion stated that the parties had discussed before the court the effect of a certain deed to the railroad by the former owner of plaintiff's property, and other details relating to the right of the railroad construction and maintenance in the street, and that in the view of the court this discussion was unimportant, because the decision of the trial court contained the express finding that the property rights and contract rights which the railroad companies had acquired were such as entitled them to maintain and use the railroad and railroad structures as they were maintained and used to and until February, 1897, without liability to the plaintiff, and that the character of maintenance and use as thus found to have been rightful was such as totally excluded the predecessors in title of plaintiff, and plaintiff, and the public, from all access to or over or use of the strip of land theretofore and now occupied by the railroad, proceeded to discuss the right of the State as against Fries, to do what it did, in view of the rights which the railroad companies had as aforesaid acquired from Fries and his predecessors in title, and announced the conclusion that

because of the rights so acquired, the act of 1892 and the authority exercised and acts done thereunder were rightful. The learned judge on pages 278–279 (160 N. Y.,) announces specifically the ground of distinction between the elevated railroad cases and the case before the court as follows:

> "The elevated railroad cases in this court proceed
> "upon the principle that, as against abutting owners,
> "the railroad was unlawfully in the street as they
> "had not consented to the construction or conveyed
> "the right to interfere with their easements. But
> "in the case at bar we have an express finding that
> "the defendant had acquired the right as against
> "the plaintiff to use the street for the operation of
> "the railroad. Hence, the principles upon which
> "that mass of litigation proceeded have no applica-
> "tion to this case, and so this court has held.
> "(*Conabeer v. N. Y. C. & H. R. R.R. Co.*, 156
> "N. Y., 474)."

Having in mind the fundamental rule and doctrine that the right of review and to reverse upon review is dependent upon the finding that the judgment is erroneous, in that it is not sustainable upon any ground that is not violative of the Federal Constitution, in some one or more particulars complained of, and that such right of review and reversal does not at all arise upon mere erroneous statement in the opinion announced, it is obviously more specious than sound to grasp at such supposedly erroneous statements in the opinion, and which, indeed, can be deemed erroneous only by reason of considering them as having no relation to facts set forth elsewhere in the same opinion, and, upon such disjointed excerpts of the opinion, assume the province of reviewing and reversing the judgment.

Each expression in the opinion is to be regarded as but a part of the entire whole. Each statement is to be taken together with and in the light of every other statement, which together constitute the entire opinion.

The judgment of the state courts determines solely the question of the liability of the railroad companies to the plaintiff. Plaintiff's complaint was against the railroad companies. It alleged that they had constructed or were constructing and intending to complete and maintain this structure, and when complete to operate the steam railroad upon it. The proof utterly failed to show that the defendants were the builders of the structure. The proof showed, on the contrary, that the structure was built by the State. That proof was undisputed. The finding is that the structure was built as provided by the act of 1892, to wit: by a state board created for that purpose. At the time of the trial the structure stood where it was built, and stands there to-day, not by reason of anything that the defendants have done, but by reason of the character and strength of the structure which the state built. The railroad companies have no more right to remove it than the plaintiff has. The determination of the trial court was that the railroad companies were not answerable in damages for the building of that structure. To have reached any other conclusion would have been to say that the railroad companies were answerable in damages for what the State did, which the railroad companies could not prevent, and with the continuance of which the railroad companies are powerless to interfere. What is true of the building of the structure is true regarding its existence as built so far as concerns the existence of this structure, and any damages resulting from it to the plaintiff; it is not a case of a structure created or existing by the act of the defendants, either with the permission of or in obedience to the command of the state, but by the act of the state itself, through the board created by it for that purpose. If this structure is of such unlawful character that it is the right of any one, other than the state itself, to remove it, it is as equally the right of this plaintiff as of the defendants.

Injunction against the defendants' use of the structure would not serve to remove the structure. A mandatory injunction against the defendants commanding them to remove the structure would certainly be unwarranted, for it would command the doing of a thing which they have no legal right to do; and, furthermore, as now appears, it does not at all follow that because the plaintiff is not entitled to hold the defendants answerable for a thing which they did not do, and with the consequences of which they are powerless to interfere, that therefore he is without remedy.

The Court of Appeals pointed out the proper source of plaintiff's remedy, and the state has, as above shown, by Chapter 729 of the Laws of 1901, provided that remedy against the state through its Court of Claims.

If upon any view it be the legal right of this plaintiff to have restored the conditions existing at the time of the 1892 enactment, whatever right he had in regard when this suit was instituted, he had as the foundation for objection to the work when the State by its board commenced the work of building an elevated structure opposite his premises.

During the five years that that work was in progress it was open and notorious. His right to speak then was clear. Upon reason and equity it would seem that his duty to speak then was equally clear, and that he failed to speak when he should, and thereby waived his right to be heard now. He saw that work go on to its result and consummation, which he knew from the first to be the designed result and consummation. By that work thus conducted and completed under his observation and notice the former railroad structure was destroyed and the present one supplied, not by the railroad company, but by the State. The inquiry naturally suggests itself, upon what foundation, as for what reason, should the railroad com-

panies be at the expense of undoing what the State did, and what, if plaintiff now has any right of complaint, he had the right to speak against and prevent the consummation of. Upon what principle of law or logic should plaintiff be permitted to remain thus silent and apparently acquiescent while this great work was carried on to its consummation, and now seek to saddle upon the the railroad companies the expense of restoring that which he might have prevented deprivation of by timely intervention on his part.

THE MUHLKER CASE IN THIS COURT.

We respectfully submit that in the Muhlker case the determination and judgment of the court have in an important and apparently controlling particular proceeded in the absence of regard to facts, which, if taken account of, well might and probably would have been deemed to render applicable to and decisive of the case rules and principles of law, other than and different from those which the facts accepted by the court have seemed to warrant application of, as the basis for adjudging reversal of the judgment of the state court, to wit:

The theory of fact upon which this court proceeded to adjudge the reversal of the judgment of the state court, is:

That the plaintiff's property right of light and air in and over the entire 140 feet width of Park Avenue was identical with the like property right of *Story* and *Lahr* in and over the streets upon which their property abutted, save and except only that plaintiff's such property right was subject unto such limitation and interference as resulted from the right of the railroad companies to maintain and operate their railroad upon the street surface, as in the *Kerr* and *Fobes* cases, or in and upon the railroad structure built and used under the act of 1872; whereas, the real fact was and is that by the deed of Poillon to the defendant Harlem Company, and the more than sixty

years' continuous, hostile, open and notorious possession under the claim, as against plaintiff and his predecessors in title, of the title which the said deed purported to grant, plaintiff's said property right of light and air in and over the said avenue was subject unto the right of the railroad companies to maintain and use their railroad at its present elevation, supported by a solid embankment with slopes occupying the width of one hundred feet. (Record, page 49.)

Upon and by reason of the foregoing misapprehension regarding the facts in the case, this court has supposed that the act of 1892, as construed and adjudged by the state court, operated to take from plaintiff his said property right of light and air vested in him subject only unto the limitations first above stated, and that the state court had adjudged this operation of the statute a lawful exercise of the power of the state, because the design and effect thereof was the enlargement and improvement of the avenue for public travel therein; whereas, the true foundation of the judgment of the state court, in holding valid the said enactment, was, that the railroad companies had acquired, from and against plaintiff and his predecessors in title, all beneficial right and interest in the sixty foot strip of land, so that plaintiff had no property right of light or air or otherwise in or over it, because he and his predecessors in title had specifically released the right to object to the existence and use of a railroad at the elevation it now exists; and, hence, that the damage or loss resulting from the change of railroad structure was not the result of any legal injury; and upon this view it was that the state court adjudged the 1892 enactment not violative of the Federal Constitution.

It is only by means of revision of the judgment of the State court upon the above-mentioned rules of local property law that a status is presented apparently violative of the Federal constitution.

Indeed the rules of law to which these directions pertain are in no whit less solely those of local property law, than those upon which this court adopted the rule of the State courts in preference to that which it had itself twenty years previously announced.

Suydam v. *Williamson*, 24 How., 427.

We respectfully submit that the writ of error should be dismissed for want of jurisdiction, or that the judgment should be affirmed.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In Error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park Avenue and One Hundred and Fifteenth Street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park Avenue, in front of said premises." The defendant, The New York

and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park Avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

> "FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is

supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"SEVENTH.—That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad

in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"TENTH.—That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plain-

tiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* vs. *New York & Hudson River Railroad* (162 N. Y., 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad* (162 N. Y. 202), both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

> "The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* vs. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence,"

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in perform-

ing the duties devolved upon it a railroad may be required to exercise the right of eminent domain (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287); see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.* (109 Mass. 103). We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's prop-

erty without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by *masonry* walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial Court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be, as expressed by Bartlett, *J.*, in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial, that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery

to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In Barnett v. *Johnson* (15 N. J. Eq. 481), there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* vs. *New York Elevated R.R. Co.* (90 N. Y., 122) and *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 268), known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front Streets in the City of New York, on which there were buildings.

To their enjoyment light, air and access were indispensable, and were had through Front Street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front Street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid, on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation

that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the

street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* vs. *Lowerre* (6 Johns. Ch., 439), or the freight depot in *Barney* vs. *Keokuk* (94 U. S., 324).

The conclusion of the Court and the distinctions made by it were repeated in *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 271). The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the

city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and it was contended that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged

in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corpo-

ration the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would — and probably would not if it could —deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument; it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R. W. & O. R. Co.* (121 N. Y. 505), where a steam railroad was permitted upon a street without liability for consequen-

tial damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more

conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and it is there said, "established beyond question the existence of these rights, or easements of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

of the Court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R.R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R.R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R.R.*, 90 N.Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N.Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expecta-

tion that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts,

Burgess v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But, again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now

is open to travel, and that an impassable barrier along its width has been removed; in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional

limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation.

Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

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CHAP. 268.

AN ACT to incorporate the New-York and Harlaem Rail-Road Company.

Passed April 25, 1831.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Benjamin Bailey, Mordecai M. Noah, Benson McGown, James B. Murray, Charles Henry Hall, Moses Henriques, Isaac Adriance, Thomas Addis Emmet, Gideon Lee, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen and Robert Stewart, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the New-York and Harlaem Rail-Road Company, with power to construct a single or double rail-road or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One hundred and twenty-fourth street and the north bounds of One hundred and twenty-ninth street, to transport, take and carry property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the said company may choose to employ; and by that name, they and their successors shall be and they are hereby vested with the right and privilege of constructing, erecting, building, making and using a single or double rail-road or way for the purpose aforesaid, and for the term of thirty years from the passage of this act.

SEC. 2. If the corporation hereby created shall not within six months from the passage of this act, locate the route of said rail-road or way and the branch to the same, and make a survey of such location, and file a map thereof in the register's office of the city and county of New York, and within two years from the passage of this act commence, and within four years from the passage of this act construct, finish, and put in operation the said single or double rail-road or ways, then the said corporation shall thenceforth forever cease, and this act shall be null and void; but no such map shall be filed until the same shall have been submitted to and approved by the common council of the city of New-York; such approbation shall be expressed by a joint resolution of the said common council, declaring their approbation of the map, and of the route of the said rail-road indicated therein.

SEC. 3. The capital stock of the said company shall be three hundred and fifty thousand dollars, and the stock shall

be divided into shares of fifty dollars each, and shall be deemed personal property, transferrable in such manner as the by-laws of said corporation shall direct.

SEC. 4. Isaac Adriance, Mordecai M. Noah, Benjamin Bailey, Moses Henriques, Thomas Addis Emmet, Benson McGown, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen, and Robert Stuart, shall be commissioners, the duty of whom it shall be, on or before the first Monday of June next after the passing of this act, at some suitable place in the city of New-York, to open books to receive subscriptions to the capital stock of the said corporation, and twenty days' public notice shall be given by the said commissioners of the time and place of opening such books, in one of the public newspapers of the said city; and said books shall be kept open for three days from ten to two o'clock of each day, and within ten days after the said stock shall be subscribed, to give a like notice for a meeting of the stockholders, at such time and place as the said commissioners shall appoint, to choose thirteen directors, and such election shall be then and there made by such of the stockholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the stockholder to one vote; and the said commissioners shall be inspectors of the first election of directors of the said corporation, and shall certify, under their hands, the names of those duly elected, and deliver over the subscription books to the said board of directors; and the time and place of holding the first meeting of the first directors shall be fixed by the said commissioners, and the said board of directors shall have power to appoint an engineer, and cause such examinations and surveys for the said rail-road to be made as may be necessary to the selection by them of the most advantageous line, course or way for the said way; and the said board of directors shall, after such examinations and surveys shall be made, select and under their hands and seals, designate the line, course or way, which they may deem most advantageous for the said rail-road, one of which certificates shall be filed in the office of the register of the city and county of New-York; which line, course or way, so selected and certified, shall be deemed the line, course or way on which the said corporation shall construct, erect, build or make their single or double rail-road or ways as hereinafter mentioned; the expenses of all which surveys and examinations, and all manner of incidental expenses relating thereto, shall be paid for by the said corporation.

SEC. 5. The commissioners shall proceed to distribute the capital stock of the said corporation among the subscribers thereto; and in case there should be subscriptions to more than the amount of such stock, within the time above pre-

scribed, it shall be the duty of the said commissioners to apportion the same among the subscribers thereto, in such manner as they shall deem most advantageous to the interest of the institution; but no person who shall have subscribed for twenty shares or upwards, shall, upon such distribution, receive less than twenty shares, unless the subscriptions for the said last mentioned or a less number of shares, shall exceed the whole amount of the capital stock; nor shall there be allowed to any one of the commissioners or subscribers, directly or indirectly, or to any one in trust, for him, more than two hundred shares of said stock, if, without such allowance, the whole of the stock be taken up; and if, at the expiration of the third day on which the subscription books shall have been kept open, the whole amount of the capital stock shall not have been subscribed, then the commissioners may subscribe for the remaining shares.

SEC. 6. The said board of directors to be chosen at such meeting, or at such annual election, shall, as soon as may be after every election, choose out of their own number one president, and one other person to be vice-president; and in case of the death, resignation or absence of the president, the vice-president shall preside until the annual election thereafter, or until he shall return, or another president shall be chosen; and in case of the death or resignation of the president or vice-president, or of any director, such vacancy or vacancies may be filled for the remainder of the year, wherein they may happen, by the board of directors; and in case of the absence of the president and vice president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide.

SEC. 7. In case it should at any time happen that an election of directors shall not be made on any day when pursuant to this act it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time directed by the by-laws of the said corporation, within sixty days after the day on which it should have been held.

SEC. 8. The said corporation are hereby authorized, by their agents, surveyor, and engineers, to enter upon such route, place or places, to be designated as aforesaid by the said directors, as the line, course, road and way whereon to construct their single or double rail-road or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall

be made to the said corporation, to aid in the construction, maintenance and accommodation of the said single or double rail-road, or ways, provided that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation, of the owner or owners of the same, at a price to be mutually agreed upon between them; and in case of a disagreement of price, and before the making of any portion of the road upon said land, the said corporation or the owner of such land may apply by petition to the vice-chancellor of the first circuit, who upon such application shall cause such notice to be given to the other party as he shall deem proper and sufficient, appointing therein the time and place of hearing the parties, at which time and place, upon proof that the notice directed has been given, the said vice-chancellor shall direct the manner of ascertaining the damages which the owner of such land or real estate will sustain by the occupation thereof by the said corporation; and the said vice-chancellor shall appoint three competent and disinterested commissioners, who shall be freeholders and residents of the city of New-York, and who shall, under the direction of the said vice-chancellor, make appraisements and determine said damages and report in writing under their hands to the said vice-chancellor, who shall examine the same and hear the parties in relation thereto if he shall deem it expedient, and increase or diminish the damages if he shall be satisfied injustice has been done. The report shall contain a minute and accurate description of the land appraised. The commissioners shall be allowed three dollars each a day for their services. Upon proof to the said vice-chancellor, to be made within thirty days after his determination of payment to the owner or of the depositing to the credit of the owner in such incorporated moneyed institution, as the said vice-chancellor shall direct, of the amount of said damages and the payment of all expenses, the said vice-chancellor shall make an order or decree, particularly describing the land and reciting the appraisement of damages and the mode of making it, and all other facts necessary to a compliance with this section of this act; and when the said order or decree shall be recorded in the office of the register of the city and county of New-York, the said corporation shall be seized and possessed of the fee simple of all such lands or real estate, and may enter upon, take and use the same for the purposes of the said road.

SEC. 9. In case any married woman, infant, idiot or insane person or non-resident of the state, who shall not appear after such notice, shall be interested in any such land or real estate, the said vice-chancellor shall appoint some competent disinterested person to appear before the said commissioners and act

for and in behalf of such married woman, infant, idiot, insane person or non-resident.

SEC. 10. The said corporation is hereby authorized to construct, erect, build, make and use a single or double rail-road or ways, of suitable width and dimensions, to be determined by the said corporation, on the line, course and way, selected or designated by them in manner aforesaid, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and such other buildings for the accommodation of their concerns, as they may deem suitable to their interests: The said corporation shall not take any lands without the consent of the owner or owners thereof, exceeding forty feet in width from east to west, and shall in case of their locating the route of the said rail-road in or along any public street or avenue now laid out on the map or plan of the city of New-York, leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a side walk for foot passengers.

SEC. 11. Whenever it shall be necessary for the construction of their single or double rail-road or way, to intersect or cross any stream of water or water courses, or any road, street or highway, it shall be lawful for the said corporation, with the consent and approbation of the mayor, aldermen and commonalty of the city of New-York, to construct their single or double rail-road or ways across or upon the same; provided that the corporation shall restore the stream or water course or road, street or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness, and shall moreover erect and maintain sufficient fences upon the line of the route of their single or double rail-road or ways.

SEC. 12. It shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of property or persons on the single or double rail-road or ways aforesaid, hereby authorized to be constructed, erected, built, made and used.

SEC. 13. If any person or persons shall wilfully do or cause to be done any act or acts whatever, whereby any building, construction or work of the said corporation, or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, by action of debt.

SEC. 14. Each subscriber shall pay twenty per cent on the amount subscribed by him, at the time of making such subscription; and it shall be lawful for the directors or a majority of them, to require payment of such other sums of the capital stock at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeitures of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time when the same are to be paid, at least thirty days previous to the payment of the same, in a public newspaper published in the city of New-York.

SEC. 15. The said corporation shall possess the general powers, and be subject to the general restrictions and liabilities prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as are not repealed.

SEC. 16. Nothing in this act shall be deemed to authorize the said corporation to construct or use their single or double rail-road or way across or along any of the streets or avenues as designated on the map of the city of New-York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way across or along said streets or avenues, or prohibit them from constructing the same, and after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof; and nothing in this act contained shall prevent the legislature from granting to any other corporation or persons, the right of constructing a rail-road or roads parallel with the one herein mentioned, or any part of it, on any lands, street, road or avenue not occupied by the rail-road or way hereby authorized, or the right of crossing or intersecting the same at any point or points, without making compensation for injuries sustained thereby.

SEC. 17. No person who shall at the time be a member of either branch of the common council of the city of New-York, shall act as commissioner or director of said corporation under this act.

SEC. 18. The legislature may at any time alter, amend, modify or repeal this act.

CHAP. 274.

AN ACT to alter the map or plan of the city of New-York.
Passed April 27, 1837.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. All that part of Forty-First-street lying between the Fifth and Sixth avenues; also all that part of Sixty-Eighth-street lying between the Third and Fourth avenues; also all those parts of Eightieth, Eighty-First, Eighty-Second, Eighty-Third, Eighty-Fourth and Eighty-Fifth-streets lying between the Sixth and Seventh avenues, as the same are laid out and designated on the map or plan of the city of New-York, are hereby discontinued on the said map or plan.

SEC. 2. The Fourth avenue shall be continued and extended on the said map or plan from Sixty-Sixth-street to Sixty-Eighth-street. Also Avenue A and the First, Second, Third and Fourth avenues shall be respectively continued and extended on the said map or plan from One Hundred and Sixth-street to One Hundred and Ninth-street. Also One Hundred and Seventh and One Hundred and Eighth-streets shall be respectively continued and extended on the said map or plan from the Fifth avenue to the Harlaem river. And the owner or owners of the lands and tenements which shall be included in any blocks or plots of ground to be formed by such extension and continuation of the said avenues and streets, respectively, shall have, hold, occupy, possess and enjoy the same, in like manner as he, she or they would have been entitled to do if the said avenues and streets had been originally so extended and continued on the said map or plan; and whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid, in like manner as the same would have been done if the said avenues and streets had been originally so extended and continued.

SEC. 3. All that part of the Fourth avenue in the city of New-York, lying between Thirty-Fourth-street, and the Harlaem river, shall be widened on the map or plan of the said city, by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue one hundred and forty feet.

SEC. 4. The said part of the Fourth avenue so to be widened is hereby declared to be one of the avenues of the city of New-York in like manner and with the like effect as if the same had been so laid out by the commissioners appointed in and by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the city of New-York, and for other purposes," passed April 3d, 1807.

CHAP. 143.

AN ACT to amend an act entitled "An act relating to the New-York and Harlem Railroad Company," passed May 7, 1840, and the acts amending the same.

Passed March 29, 1848.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * *

Sec. 6. The New-York and New-Haven Railroad Company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem Railroad Company, from the point of junction of the roads of said companies at or near William's bridge, in the county of Westchester, to the city of New-York, and as far into said city as the said Harlem railroad may extend, upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies; a copy of such agreement or agreements to be duly authenticated and filed in the office of the secretary of state of this state; and to take, transport and convey persons and property upon the said Harlem railroad, by the power and force of steam or animals or any mechanical power or combination of the same.

CHAP. 387.

AN ACT to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York.

Passed April 16, 1859.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company are hereby authorized, pursuant to the ordinance of the mayor, aldermen and commonalty of the city of New York, passed December twenty-seventh, eighteen hundred and fifty-eight, and approved December thirty-first, eighteen hundred and fifty-eight, to lay down a double track or railway from their track in the Fourth avenue, at Forty-second street, up said street to Madison avenue, and up Madison avenue to Seventy-ninth street, for the use of their small cars only.

SEC. 2. The New York and Harlem Railroad Company is hereby authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York island, to the south side of Forty-second street, in said city, with turnouts to their en-

gine-houses, respectively, for a period of thirty years from the thirty-first day of December, eighteen hundred and fifty-eight.

SEC. 3. All the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April twenty-fifth, eighteen hundred and thirty-one, and the several acts amending the same, subject to all the restrictions imposed by said several acts, except as herein modified, are hereby extended for the term of thirty years from the passage of this act. Nothing in this act shall be construed to prevent the legislature at any future time from rescinding, altering or amending this act, or the privileges hereby granted.

SEC. 4. This act shall take effect immediately.

CHAP. 880.

AN ACT for the protection of persons traveling upon Fourth avenue, in the city of New York.

Passed May 10, 1867; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem railroad company shall within two years from the passage of this act, construct up to the grade of Fourth avenue, in the city of New York, a substantial stone or brick wall, with suitable coping upon each side of their road, upon a line not exceeding twenty-six feet in the clear at any point of measurement below the tunnel at Ninety-second street in said city, and from the north side of Seventy-ninth street to the south side of Eighty-eighth street, where the road bed or track is below the grade of the avenue, and where the same is not arched or covered, and shall also, within said period, erect upon said wall (except at street crossings, where bridges are, or shall be constructed) a substantial iron fence for the protection of persons using said avenue, said wall and fence to be so finished and constructed, as shall be approved by the engineer of the Croton aqueduct board. Said wall shall extend as high above the grade of the avenue as the said engineer shall direct, and the railing thereon shall be not less than three feet in height; and one-half of said wall in lineal feet shall be constructed within one year from the date of the passage of this act, and the balance in two years.

SEC. 2. Within two years after the passage of this act, The New York and Harlem Railroad Company shall construct and complete an arch of masonry work over the track of the road of said company, in the Fourth avenue of the city of New York, from the south line of Eighty-eighth street to and connecting with the rock cut so called on Ninety-second street, in the said city. The said arch shall be constructed of such ma-

terial, and of such thickness, and of such strength and in such manner in all respects as the engineer of the Croton aqueduct board shall prescribe. Whenever the said company shall have expended the sum of twenty-five thousand dollars in the prosecution of the said work, and shall produce to the comptroller of the city of New York the certificate of the said engineer to that effect, the said comptroller shall draw his warrant in favor of the said company upon the treasury of the said city, and deliver the said warrant to the said company for the sum of twelve thousand five hundred dollars, and so on from time to time as often as the said company shall have expended a like sum of twenty-five thousand dollars, and shall produce the like certificate of the said engineer, the said comptroller shall draw his warrant in favor of the said company and deliver it to the said company, upon the treasury of the said city for the like sum of twelve thousand five hundred dollars. And when the said company shall have fully completed the said arch to the full satisfaction and approval of the said engineer, and shall produce his certificate to that effect and of the last installment expended by the said company in the construction thereof to the said comptroller, the said comptroller shall draw his warrant in favor of the said company and deliver the same to the said company for one-half of the amount of such last installment. The said several warrants shall be paid out of any moneys in the treasury of the said city raised and appropriated for roads and avenues. The construction of the said arch shall be commenced on or before the first day of July next, and one-half thereof shall be completed in one year from the said first day of July next, and the balance in two years from the passage of this act. Nothing in this act contained shall be held or construed to oblige the said company to fill in and grade and level over and about the said arch, but filling in and grading and levelling over and about the same shall be done by the mayor, aldermen and commonalty of the said city.

SEC. 3. It shall be the duty of the city authorities of the city of New York, now vested with the power of regulating and grading the streets and avenues of said city, to regulate and put in good condition said avenue, and fill in the spaces behind said walls as rapidly as they shall be constructed by said railroad company.

SEC. 4. If the said railroad company shall fail to comply with any of the provisions of this act, they shall be liable to a penalty of two hundred and fifty dollars for each and every day said failure to comply shall continue, unless said engineer shall certify that said railroad company have used due diligence in prosecuting said work, which penalty, with costs, shall be sued for by the district attorney of the county of New York, in the name of the people of the State, in any court of

record in said county, and which penalty, when recovered, shall be paid by said district attorney, as follows: one-half of said penalty to the informer, and the other half to the commissioners of charities and corrections, to be used by them in such manner, for the benefit of the persons under their charge, as they shall deem best.

SEC. 5. Nothing in this act contained shall be construed as in any manner extending or increasing the rights of said railroad company, or as depriving the common council of the city of New York of any powers now possessed by it, except as specially herein provided.

SEC. 6. The legislature may at any time amend or repeal this act.

SEC. 7. This act shall take effect immediately.

CHAP. 702.

AN ACT to improve and regulate the use of the Fourth avenue in the city of New York.

Passed May 14, 1872; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company is hereby authorized and required to regulate the grade of their railroad in the Fourth avenue of the city of New York, and to construct such viaducts, foot and road bridges over the same, and such excavations and tunnels under the same, with openings for proper ventilation, for the purpose of rendering the same safe and convenient to any persons crossing the same, and the railroad trains and passengers traveling thereon, in the following manner, namely: At Forty-fifth and Forty-eighth streets, to construct tunnels under the said streets and the Fourth avenue for sidewalks and carriage ways underneath the railroad at least thirty-four feet wide, or bridges over the railroad of at least that width, for the same purpose, and at Forty-sixth, Forty-seventh and Forty-ninth streets tunnels under the said streets and the Fourth avenue, or bridges over the same, at least twelve feet in width, for foot passengers. Said tunnels or bridges shall have easy approaches, and the tunnels shall be dry and thoroughly ventilated and lighted. Between Forty-eighth and Forty-ninth streets the grade of the railroad shall commence to descend, and shall descend as rapidly as the operation of the road will permit, so that at Fifty-sixth street the grade of the railroad shall be thirteen feet six inches below the grade of the avenue; and from thence to Ninety-sixth street the road shall run through a covered way, with openings in the coverings not to exceed one hundred and fifty feet in length, and twenty feet in width in each block;

and thence continuing upon the present grade to the center of One Hundred and Fifth street, and thence descending at the rate of about forty feet to the mile to the center of One Hundred and Twentieth street, where the said grade shall be fourteen feet one inch below the grade of the avenue; thence descending at the rate of about twelve feet and four-tenth of a foot to the mile to the center of One Hundred and Twenty-ninth street, where said railroad grade shall be eleven feet below the grade of the avenue; thence ascending at the rate of twenty-six feet and four-tenths of a foot to the mile to the center of One Hundred and Thirty-third street to and upon the present grade of the railroad; the grade of said road at Fifty-ninth street shall not exceed fifteen feet six inches below the grade of the said avenue as established by law. At Seventy-fourth street it shall not exceed thirteen feet six inches, and at Seventy-ninth street shall not exceed twelve feet. At Fiftieth and Fifty-first streets, elevated bridges of iron for foot passengers shall be constructed over the railroad. Between Fifty-second and Fifty-third streets a bridge shall be constructed for foot passengers and carriages over the railroad, with approaches parallel with the railroad, and at Fifty-fourth and Fifty-fifth streets bridges of iron shall be constructed for foot passengers over the railroad; and from Ninety-eighth street to One Hundred and Fifteenth street, the railroad shall be carried upon a viaduct, with stone arches or iron bridges in said viaduct over the cross or intersecting streets above One Hundred and First street, to and include One Hundred and Thirteenth street. Between One Hundred and Seventeenth and One Hundred and Eighteenth streets, a bridge shall be constructed over the railroad with parallel approaches, the same as before provided between Fifty-second and Fifty-third streets; from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive, iron bridges over the railroad shall be constructed upon the line of each street the full width of the street. At One Hundred and Thirtieth and One Hundred and Thirty-first streets, iron bridges for foot passengers shall be constructed over said railroad; between Forty-fifth and Forty-ninth streets, including said streets, iron railings or brick walls shall be erected in said streets, outside the railroad tracks, so as to prevent crossing at a level with said railroad tracks. A coping and iron railing shall be constructed upon the parapet and retaining walls along the said improvement, wherever the said roadway runs through an open cut, and also around the openings between Fifty-sixth and Ninety-six streets.

SEC. 2. During the progress of the work, the New York and Harlem Railroad Company is hereby authorized to lay down such additional temporary tracks on the Fourth avenue, above

Forty-second street, as may be necessary for the railroad business during the progress of the work, and such tracks shall be removed when the work shall be completed, and said company is hereby authorized, for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings and excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct.

SEC. 3. Whenever it shall be found advisable or necessary to alter the grade of the streets crossing the said avenue or of the said avenue, where the said road shall pass through a covered way, the same may be done by said company, but so as not to interfere with the free use of the streets by the public.

SEC. 4. The sidewalks on Fourth avenue between Forty-ninth and Fifty-sixth streets, and between Ninety-sixth street and the Harlem river, shall not exceed fifteen feet in width.

SEC. 5. Whenever it shall be necessary in the progress of said work to remove or alter the Croton water pipes, sewers or gas pipes upon said avenue, the same shall be done by the department or corporation having charge thereof, so as not to interfere with said work.

SEC. 6. There shall be a board of engineers, whose duty it shall be to execute, direct and superintend the construction of the said improvement, to be called the board of engineers of the Fourth avenue improvement. It shall be the duty of the said board to file a monthly statement, under oath, of the items of their expenditure with the comptroller of the city of New York. Regular accounts of all their transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company, and to the comptroller of the city of New York. The said board are authorized to pass suitable by-laws for their own regulation and government, and to select a presiding officer and secretary from their own number. They shall keep a record of all their proceedings. The said board shall consist of four members, as follows, namely: Allan Campbell and Alfred W. Craven, or their successors, and the chief engineer of the board of public works of the city of New York for the time being, and the engineer of the New York and Harlem Railroad Company. In case of the death, removal or resignation of the said Campbell or Craven, or their or either of their successors, the vacancy shall be filled by the remaining members of the board. The said board are hereby authorized and directed to take the entire charge and control of the said improvement, and to execute the same in conformity with the provisions of this act, in a substantial

and workmanlike manner. The said engineers shall receive eight dollars each for every day that they shall be employed in the performance of their duties under this act. They may appoint one of their number as a general superintendent of the work. The said board shall prepare plans and specifications of said improvement in conformity with this act, and an estimate of the expense thereof, and file a copy of such plans, specifications and estimate in the office of the comptroller of the city of New York. The members of the said board, before entering upon the performance of their duties shall severally take and subscribe an oath or affirmation before some judge of a court of record in the city of New York, faithfully to perform the trust and duty required of them by this act and as a member of the said board of engineers, which shall be verified by such judge and filed in the office of the said comptroller.

SEC. 7. When the said plan, specifications and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York in equal proportion as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work upon the said improvement that the sum of twenty-five thousand dollars has been expended thereon by the New York and Harlem Railroad Company, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement to be borne and paid by the said city as aforesaid.

SEC. 8. For the purpose of raising the sum or amount of one-half of the estimated expense and cost of the said improvement, to be borne and paid by the city and county of New York, one-half of the proportion or amount to be borne and paid as aforesaid, or one-fourth of the whole estimated expense and cost, shall be raised by a tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the year eighteen hundred and seventy-two, and the remaining sum or one-half of the proportionate amount to be borne and paid by the said city and county shall be raised in like manner and included in the tax levy for the year eighteen hundred and seventy-three. The comptroller of the city of New York is hereby

authorized and directed to issue revenue bonds of the said city, in anticipation of the amount to be raised by taxation for the expense and cost of the said improvement in each year, to provide the means for paying the said proportion of the said city toward the said expense and cost, before the said tax shall be collected, not to exceed the due proportion to be borne and paid by the said city in each of the said years eighteen hundred and seventy-two and eighteen hundred and seventy-three; such bonds to be issued and sold at not less than par. So much of the proceeds of the said tax for each of the said years as may be necessary for the purpose shall be applied to the payment of the revenue bonds to be issued as aforesaid. It is hereby intended and declared that the payments by the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement.

SEC. 9. The mayor, aldermen and commonalty of the city of New York are forbidden to obstruct the said improvement or the use of the Fourth avenue for that purpose above Forty-second street; and the said municipal corporation is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said tunnel and railways shall be exclusively for the uses and purposes of said railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty, as such, with his agents, and assistants, to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose, without the consent of said corporation, under penalty of fifty dollars for each offense, to be recovered by this corporation.

SEC. 10. The said board of engineers shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed the said railroad company are authorized and directed to run by steam their trains (and such trains of other railroads as shall have obtained the consent of the New York and Harlem Railroad Company) over the said improvement and the route of the said railroad, and in and upon their depot at Forty-second street, and the switches, turnout and sidings, now authorized by law, north of said street.

SEC. 11. The Legislature may at any time alter, amend, or repeal this act.

SEC. 12. This act shall take effect immediately.

CHAP. 339.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

Approved by the Governor April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly at the rate of twenty-nine and six-tenths feet per mile to a point about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be level at an elevation of twenty-six feet above high-water line of spring tides, to a point about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

SEC. 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section, by raising its parapet

walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same of timber piling, or concrete, as may be found necessary.

SEC. 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry one Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park Avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

SEC. 6. The railroad tracks shall be carried on a solid tight floor, and the drainage water shall be conducted by pipes into the sewers.

SEC. 7. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, is hereby authorized and permitted, at its election, to erect station-houses on both sides of the railroad at One Hundred and Twenty-fifth street, with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-sixth street; and for the support of the girders to sustain such stations and platforms, columns may be erected along the curb lines of Park avenue, between One Hundred and Twenty-fourth and One hundred and Twenty-Sixth streets, and on the curb lines of One Hundred and Twenty-fifth street east and west of Park avenue as may be necessary, the said station columns not to exceed fifteen inches square in size above the surface of the pavement. The said stations and platforms shall be reached by stairs not less than five feet in width, which shall terminate on the side-walk pavement on both sides of One Hundred and Twenty-fifth street, east and west of Park avenue, and also upon the pavement on both sides of Park avenue adjacent to the north line of One Hundred and Twenty-fourth street and the south line of One Hundred and Twenty-sixth street. The station-houses may be built over the roadway of One Hundred and Twenty-fifth street, and may be of a length equal to the distance between the curb lines of the same.

SEC. 8. The Harlem river shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of twenty-four feet above

high water of spring tides, and shall provide passageway for vessels on both sides of the center pier, each of one hundred feet width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

SEC. 9. From the north abutment of the Harlem river bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eight street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eight street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

SEC. 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eight street, the grade level of One Hundred and Thirty-eight street as now established, shall be altered and be depressed under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eight street between Mott avenue and Railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

SEC. 11. North of the north abutment of One Hundred and

Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

SEC. 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, however, shall be done under the approval, direction and sanction of the board hereinafter appointed.

SEC. 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts

shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

SEC. 14. When the said plan, specification and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses.. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the

expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of said improvement to be paid by the city of New York, exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company.

SEC. 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

SEC. 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discrete and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties herein-

after mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or assessment.

In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

SEC. 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

SEC. 18. In each and every case of the appointment of commissioners under this act, it shall be competent and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

SEC. 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he, she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or

assessments, with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners without joining any other or others of them, the said parties or owners.

SEC. 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineteen of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act, assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year, by tax upon the real and personal property subject to taxation in the city and County of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

SEC. 21. The new bridge over the Harlem river, authorized to be constructed, by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of con-

gress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

SEC. 22. All changes in the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the legislature, are hereby changed to conform to the provisions of this act.

SEC. 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the state of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the state of New York, is hereby removed and annulled, anything in any act of the legislature of the state of New York, or in any contract made pursuant to any act of the said legislature of the state of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

SEC. 24. The mayor, aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents, or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense, to be recovered by said railroad corporation.

SEC. 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad corporations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred

and Sixth street to the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act to be constructed, shall commence.

SEC. 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvement and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

SEC. 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

SEC. 28. This act shall take effect immediately.

CHAP. 548.

AN ACT to amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Became a law May 8, 1894, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Eleventh street to the

Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 2. Section fourteen of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 14. When the said plans, specifications and estimate shall be made and filed as aforesaid, or when any amended plans, specifications and estimate authorized by law shall be so filed, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of the said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, except, nevertheless, that the mayor, aldermen and commonalty of the city of New York shall also bear and pay, in the manner in the act hereby amended

provided for, one-half of the expense of all work made necessary and done pursuant to any amended plans and specifications made and filed as provided for by this amendment to said act, in excess of the cost and expense of constructing or carrying out the said improvement in accordance with the plans and specifications heretofore made and filed; and the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, shall bear and pay, in the manner in the act hereby amended provided for, the remaining one-half of the said cost and expense; and the certificates of payment by either of said railroad companies, in this section hereinbefore provided for, to be made by the superintending engineer of said improvement, duly certified to by the aforesaid board, to cover any expense or cost that may be made necessary by any such amended plans and specifications, shall state the fact that the expense and cost in the said certificate specified was made necessary by such amended plans and specifications, and said certificates shall be conclusive evidence of such fact. But nothing herein contained shall be construed to obligate the city of New York to pay as its share of the work done under such amended plans and specifications a greater sum than fifty thousand dollars of such additional expense.

SEC. 3. In addition to the powers conferred upon the board for the Park avenue improvement above One Hundred and Sixth street, by chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, the said board may, at any time within three months after the passage of this act, amend the plans, specifications and estimates of that part of the said improvement between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, so that the space between the exterior lines of the retaining walls of the present railroad structure and between the south line of One Hundred and Eleventh street and the south line of One Hundred and Fifteenth street shall form a part of Park Avenue, and be paved as provided in section three of said chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, and such amended plans, when approved by the commissioner of public works, shall be filed in the office of the comptroller of the city of New York. In such case the said board shall also file with the comptroller amended specifications of said work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street in accordance with such amended plan; and an amended estimate of the cost of the entire work between One Hundred and Sixth street and the Harlem river, according to such amended plans and specifications. Upon the filing of such amended plans, specifications and estimate, the plans, specifications and estimate

heretofore made and filed shall be deemed to be amended accordingly. And the said board is hereby authorized, without advertisement, to make such supplemental contract or contracts, or such contract or contracts modifying any contract or contracts heretofore made by the said board with any contractor or contractors for any part of the work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, as may be necessary, in order to have the said work done in accordance with such amended plans, specifications and estimate. Nothing herein contained shall authorize the said board to change the grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as fixed and established by section one of chapter three hundred and thirty nine of the laws of eighteen hundred and ninety-two.

SEC. 4. This act shall take effect immediately.

CHAP. 594.

AN ACT to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passing of intersecting streets under the railroad structure of the New York and Harlem Railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Accepted by the city.

Became a law May 13, 1896, with the approval of the Governor. Passed three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section seven of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, is hereby amended to read as follows:

SEC. 7. The New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized and directed, to erect and maintain a station at One Hundred and Twenty-fifth street, and for that purpose to erect and maintain a station building in Park avenue, extending from the north line of One Hundred and Twenty-fifth street to the south line of One Hundred and Twenty-sixth street, forty feet in width, with suitable stair-

ways on the easterly and westerly sides thereof, not exceeding five feet in width. The northerly and southerly center line of the said station building shall be the centre line of Park avenue. Suitable sidewalks and curbs shall be laid on each end and side of the said station building, and there shall be left a clear roadway, between the curb on the easterly side of Park avenue and the curb on the easterly side of the said station building and between the curb on the westerly side of the said station building and between the curb on the westerly side of Park avenue and the curb on the westerly side of the said station building, of twenty-six and one-half feet in width. For the purposes of the said station at One Hundred and Twenty-fifth street, the said viaduct structure shall be of such width as may be necessary for the construction and maintenance of suitable platforms and station buildings between the tracks, and for the necessary approaches to such platforms and station buildings, but not to exceed eighty-two feet in width, except that the cross girders to sustain such platforms, station buildings and approaches, may be supported on columns erected along the curb lines of Park avenue between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street, the said columns not to exceed fifteen inches square in size above the surface of the pavement. Suitable stairways, not exceeding five feet in width, shall also be erected and maintained from the south side of One Hundred and Twenty-fifth street to the said platforms and station buildings between the tracks. The plan of the said improvement heretofore approved by the commissioner of public works of the city of New York and filed in the office of the comptroller of the city of New York on the twelfth day of November, eighteen hundred and ninety-two, as amended and modified by the plan approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, on the twenty-first day of June, eighteen hundred and ninety-four, is, and shall be deemed to be, hereby amended and modified to conform to the provisions of this section, and as so amended and modified, is hereby authorized, ratified and confirmed, and the said, the New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized to take down so much of the structure heretofore erected between One Hundred and Twenty third street and One Hundred and Twenty-seventh street in accordance with the said plan of the said improvement filed in the office of the comptroller of the city of New York, on the twelfth day of November, eighteen hundred and ninety-two, as is not necessary or required for the purposes of the station in this section provided for.

SEC. 2. This act shall take effect immediately.

CHAP. 613.

AN ACT relating to and to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One hundred and Sixth street in The City of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes," as amended by chapter five hundred and forty-eight of the laws of eighteen hundred and ninety-four and by chapter five hundred and ninety-four of the laws of eighteen hundred and ninety-six, and transferring all the powers of "the board for the Park avenue improvement above One hundred and Sixth street" to the commissioner of highways of The City of New York on and after the tenth day of March, eighteen hundred and ninety-eight.

Accepted by the city.

Became a law April 29, 1898, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. On the tenth day of March, eighteen hundred and ninety-eight, "the board for the Park avenue improvement above One hundred and Sixth street" created pursuant to chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, shall deliver to the commissioner of highways of The City of New York all records, books, papers and maps in its office, or under its control, and upon the said tenth day of March, eighteen hundred and ninety-eight, the term of office of the said "the board for the Park avenue improvement above One hundred and Sixth street" and of each member thereof shall expire, and said board shall cease to exist on that day,

SEC. 2. From and after the said tenth day of March, eighteen hundred and ninety-eight, all the power and duties imposed or conferred upon the said "the board for the Park avenue improvement above One hundred and Sixth street" by the said act, or any amendment thereof, are hereby transferred to, and shall be devolved upon, and shall be performed by, the commissioner of highways of The City of New York.

SEC. 3. Nothing herein contained shall in any manner impair or affect any contract heretofore made by or with the said "the board for the Park avenue improvement above One Hundred and Sixth street," and any contract and all rights thereunder heretofore made by or with the said board, may be enforced in the name of "The City of New York" by the said commissioner of highways in the same manner and to the same extent that any such contract or any such rights thereunder might or could have been enforced by the said board under and pursuant to the provisions of the said act hereby amended or otherwise.

SEC. 4. Nothing herein contained shall relieve The New York and Harlem Railroad Company, or its lessee, The New York Central and Hudson River Railroad Company, from any costs, charges or expenses imposed upon the said railroad companies, or either of them, in and by the act hereby amended, or impose upon The City of New York any costs, charges or expenses not imposed by the said act hereby amended.

SEC. 5. This act shall take effect immediately.

CHAP. 425.

AN ACT to provide for further regulation of the terminals and approaches thereto of the New York and Harlem railroad at and north of Forty-second street in the city of New York and of the public highway structures over said terminals and approaches and of the motive power to be used on said railroad.

Accepted by the city.

Became a law, May 7, 1903, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Upon the approval and filing by the board of estimate and apportionment of the city of New York of the plans and profiles provided for in section three of this act, and the delivery of the grant provided for in section two of this act, the New York and Harlem Railroad company, and its lessee the New York Central and Hudson River Railroad company, are and each of them is hereby authorized and directed to depress all of the existing tracks of the New York and Harlem Railroad company between Fifty-seventh street and Forty-second street, and Madison avenue and Lexington avenue, in the city of New York, to such grade, and to construct all tracks hereafter laid within the said limits or boundaries at such grades as will enable the city of New York to

carry Forty-fifth street, Forty-sixth street, Forty-seventh street, Forty-eighth street and Forty-ninth street, across said tracks by suitable viaducts or bridges at a grade or grades not exceeding four per centum; and also to carry Fiftieth street, Fifty-first street, Fifty-second street, Fifty-third street, Fifty-fourth street, Fifty-fifth street and Fifty-sixth street across said tracks by suitable viaducts or bridges at normal grade. The said railroad corporations are and each of them is hereby authorized to make such alterations and changes in existing structures erected pursuant to chapter seven hundred and two of the laws of eighteen hundred and seventy-two, south of Fifty-ninth street, as may be necessary or reasonably required in carrying out the provisions of this act. The said railroad corporations are and each of them is hereby authorized, subject to the provisions of the building code of the city of New York, to make alterations, changes or additions in and to the passenger depot buildings, heretofore constructed between Forty-second street, Forty-fifth street, Vanderbilt avenue and Depew place, or to remove the said passenger depot buildings, or any part thereof, and to reconstruct the same or to construct new buildings to such an extent and in such manner as may be necessary or reasonably required in the proper management and conduct of their business, upon the said land bounded by Forty-second street, Forty-fifth street, Vanderbilt avenue and Depew place.

§ 2. In order to enable the said railroad corporations to depress their tracks as hereinbefore provided, and to permit the operation of trains otherwise than by steam locomotives as hereinafter required, the city of New York, acting by its board of estimate and apportionment, is hereby authorized and empowered to grant to the said railroad corporations, by suitable instrument or instruments in writing, the right to occupy and use, for the purposes of their incorporation, during the term or terms of their corporate existence; the sub-surface of Park avenue from Forty-fifth street to the southerly line of Fifty-sixth street; the sub-surface of Park avenue, bounded and described as follows: beginning at the point where the southerly line of Fifty-sixth street intersects the easterly line of Park avenue and running thence in a northwesterly direction to a point in the centre line of Fifty-seventh street thirty-three feet easterly from the centre line of Park avenue; thence westerly along the centre line of Fifty-seventh street sixty-six feet; thence in a southwesterly direction to the point where the southerly line of Fifty-sixth street intersects the westerly line of Park avenue, and thence easterly to the place of beginning; Forty-fifth street, from the easterly line of Vanderbilt avenue to the westerly line of Depew place; the sub-surface of Forty-sixth

street, from the easterly line of Madison avenue to the westerly line of Lexington avenue; the sub-surface of Forty-seventh street, from the easterly line of Madison avenue to the westerly line of Lexington avenue; the sub-surface of Forty-eighth street, from a line described as follows: beginning at a point in the northerly line of Forty-eighth street, distant one hundred sixteen and sixty-seven one-hundredths feet easterly from the easterly line of Madison avenue; thence southerly parallel with Madison avenue fifteen feet; thence in a southwesterly direction to a point in the southerly line of Forty-eighth street, distant sixty feet easterly from the easterly line of Madison avenue; to the westerly line of Lexington avenue; the sub-surface of Forty-ninth street, bounded and described as follows: beginning at a point in the northerly line of Forty-ninth street, distant fifty-three feet westerly from the westerly line of Park avenue, and running thence southerly parallel with Park avenue fifteen feet; thence in a southwesterly direction to a point in the southerly line of Forty-ninth street, distant sixty-five feet westerly from the westerly line of Park avenue; thence easterly along the southerly line of Forty-ninth street, to a point distant one hundred seventy-five feet westerly from the westerly line of Lexington avenue; thence in a northwesterly direction to a point in the northerly line of Forty-ninth street, distant two hundred and twenty-six feet westerly from the westerly line of Lexington avenue; thence westerly to the place of beginning; and the sub-surface of Fiftieth street, between the westerly line of Park avenue and the following described line: beginning at the intersection of the northerly line of Fiftieth street with the easterly line of Park avenue, and running thence in a southeasterly direction to a point in the southerly line of Fiftieth street, distant sixty feet easterly from the easterly line of Park avenue. Nothing in this act contained shall be held to create a fee in said railroad corporations, or either of them, in or to the soil of said portions of said streets or of Park avenue, or any part thereof; nor to prevent the city of New York from occupying or using, or from permitting others to occupy or use any part of the said soil of said portions of said streets or avenue underneath the tracks and structures of the said railroad corporations as shown on the plans and profiles provided for in section three of this act in any manner which shall not interfere with or endanger the occupation or use by the said railroad corporations.

§ 3. The New York Central and Hudson River Railroad company shall prepare plans and profiles of the viaducts or bridges required to carry the said streets, from Forty-fifth street to Fifty-sixth street, both inclusive, over the tracks of

the said railroad and to carry the central portion of Park avenue from Forty-ninth street to Forty-fifth street over the said tracks, and on such plans and profiles shall be shown the grade or depth to which the tracks and structures of the said railroad corporations are to be constructed underneath such viaducts or bridges. The said bridges or viaducts shall in every case, except as hereinafter provided, be fifty feet in width. They shall be so constructed as to leave sufficient clearance above the tracks when depressed as above provided, for the free passage and operation of the cars of the railroad companies using the said tracks, and the grade of the roadway of such viaducts or bridges shall not exceed four per centum. The New York Central and Hudson River Railroad company shall, within thirty days after the day on which this act shall take effect submit the said plans and profiles in duplicate to the board of estimate and apportionment of the city of New York for its approval. If such plans and profiles are approved by the board of estimate and apportionment, such approval to be evidenced by a resolution adopted by a majority of the votes in said board, a copy of such resolution, duly certified by the mayor and comptroller of the city of New York, shall be endorsed upon, or annexed to, each copy of such plans and profiles; and one copy of such plans and profiles, so approved, shall be filed with the board of estimate and apportionment of the city of New York, and the other copy shall be delivered to the New York Central and Hudson River Railroad company. Upon such plans and profiles or any modifications thereof made as hereinafter provided being approved and filed as aforesaid, any and all alterations or changes in streets, avenues or public places, or in the grade or grades, width or widths thereof, and any and all modifications in or of the use of any existing street, avenue, highway or public place, or any part thereof, shown upon said plans and profiles shall be deemed to have been duly authorized, and the map or plan of the city of New York, shall be deemed to have been changed accordingly without any further act or proceeding by or on the part of the city of New York, or of any officer, board or department thereof; and all such interests or easements in any lands of or owned by the said railroad corporations, or either of them, as shall be necessary or reasonably required for the construction of such viaducts or bridges shall thereupon be deemed to be vested in the city of New York. The said board of estimate and apportionment shall thereupon cause three copies of such plans and profiles to be made and filed, one in the office of the register of the city and county of New York, one in the office of the corporation counsel of said city, and one in the office of the president of the borough of Manhattan of

said city. The city of New York is hereby authorized to carry and maintain the said streets from Forty-fifth street to Fifty-sixth street, both inclusive, and the said central portion of Park avenue, over the tracks of the said railroad by viaducts or bridges in accordance with the said plans and profiles. The work of constructing such viaducts or bridges in accordance with the said plans and profiles approved as aforesaid by the board of estimate and apportionment, shall be done and performed by the New York Central and Hudson River Railroad company for and on behalf of and as contractor with the said city. For and in consideration of having the use of the portions of said avenue and of the said streets, herein above described, the said railroad corporations shall be at the entire expense of depressing said tracks, and shall pay to the city of New York the sum of twenty-five thousand dollars per annum so long as the said railroad corporations or either of them or their or either of their successors or assigns shall hold, occupy or use the same; and they shall also bear and pay all the expense of constructing said viaducts and bridges, excepting the said Park avenue viaduct, in excess of six hundred thousand dollars. The city of New York shall bear and pay to the New York Central and Hudson River Railroad company in full compensation for its work, labor and services to be rendered as herein provided the sum of six hundred thousand dollars of the cost and expense of constructing the viaducts and bridges carrying said streets from Forty-fifth street to Fifty-sixth street, both inclusive, over said tracks, and also the entire expense of constructing the viaduct carrying Park avenue over the said tracks from Forty-ninth street to Forty-fifth street. The viaduct or bridge required to carry Forty-fifth street over said tracks shall be constructed, either wholly or partly, north of the present north line of said street, and the said board of estimate and apportionment may, in its discretion, require that such viaduct or bridge, or any part thereof, shall be not to exceed seventy feet in width; and in that case the expense of constructing so much of such viaduct or bridge as shall be in excess of fifty feet in width shall be borne and paid by the city of New York. The portion of the expense to be borne and paid by the city of New York as aforesaid shall be paid to the said railroad company at such time or times and in such manner as shall, at or prior to the time of approving and filing the said plans and profiles as hereinbefore provided, be agreed upon by said railroad company and the board of estimate and apportionment of the city of New York. The said railroad corporations shall have the right to construct and maintain on the said viaducts or bridges such signal or other

apparatus as may be required for the safe operation of their road and tracks; but all such apparatus shall be constructed and maintained in such manner as not to obstruct the roadways or sidewalks of such viaducts or bridges or unnecessarily disfigure them. The work of depressing the tracks and constructing the viaducts or bridges hereinbefore provided for shall be commenced within thirty days and completed within five years after the date on which the grant provided for in section two of this act shall be delivered, and the plans and profiles of the said viaducts or bridges shall be approved and filed by the board of estimate and apportionment as hereinbefore provided.

§ 4. From and after the expiration of five years after the approval aad filing of the plans and profiles provided for in section three of this act and the delivery of the grant provided for in section two of this act, it shall not be lawful, except only in case of necessity, arising from the temporary failure of such other motive power as may be lawfully adopted, for any railroad corporation to operate trains by steam locomotives in Park avenue in the city of New York south of the Harlem river. If at any time after the expiration of the said five years trains shall be operated by steam locomotives in said Park avenue south of the Harlem river for a period of more than three days, the railroad corporation so operating such trains shall pay to the city of New York a penalty of five hundred dollars for every day or part of a day during which such trains are so operated, unless the mayor of the city of New York shall certify to the necessity for the use of steam locomotives arising from the temporary failure of other motive power. Such certificate of the mayor may be revoked by him at any time. In any action or proceeding brought by the city of New York against a railroad corporation to recover such a penalty the said certificate of the mayor shall be *prima facie* evidence of the facts therein stated, and the said railroad corporation shall be permitted to allege, as matter of defense, that the mayor's certificate was refused or revoked unreasonably or in bad faith, and in every such case the burden of establishing that defense shall be upon the defendant making that allegation. Such a certificate or the fact of its existence, or nonexistence, shall not be evidence in any action or proceeding except an action or proceeding to recover a penalty as above provided. And the New York and Harlem Railroad company and its lessee, the New York Central and Hudson River Railroad company, so long as it remains such lessee, and the New York, New Haven and Hartford Railroad company, so long as it has any contract or other rights to operate its trains in Park avenue south of the Harlem river, and such other railroad com-

panies as may hereafter obtain permission therefor, are hereby authorized to run their trains by electricity, or by compressed air or by any motive power other than steam and which does not involve combustion in the motors themselves, through the tunnel and over the improvements made pursuant to chapter seven hundred and two of the laws of eighteen hundred and seventy-two, and pursuant to chapter three hundred and thirty-nine of the laws of eighteen hundred ninety-two and the acts amendatory thereof and supplemental thereto, and pursuant to this act, and over the route of the said railroad and in and upon the depot at Forty-second street, and the stations, switches, turn-outs, loops and sidings, and the approaches thereto, now or hereafter authorized by law. No power house constructed to supply power for the purposes of this act (except stations for the transformation of electric current) shall be placed on Manhattan Island more than two blocks from the water front, except with the consent of the board of estimate and apportionment.

§ 5. The New York and Harlem Railroad company, and its lessee, the New York Central and Hudson River Railroad company, are, and either of them is, hereby authorized and empowered to acquire from the city of New York, and the city of New York, acting by the board of estimate and apportionment of said city, is hereby authorized and empowered, in its discretion, to grant to said railroad corporations, or to either of them, any and all lands, or rights, interests or easements in lands in anywise owned, occupied or controlled by the city of New York, within the following territory, namely: beginning at the intersection formed by the westerly line of Lexington avenue and the southerly line of Fiftieth street; running thence westerly along the southerly line of Fiftieth street to the westerly line of Park avenue; thence southerly along the westerly line of Park avenue to the northerly line of Forty-eighth street; thence westerly along the northerly line of Forty-eighth street to the easterly line of Madison avenue; thence southerly along the easterly line of Madison avenue to the northerly line of Forty-second street; thence easterly along the northerly line of Forty-second street to the westerly line of Lexington avenue; and thence northerly along the westerly line of Lexington avenue to the place of beginning, which may be necessary or required for the purpose of making any alterations, changes or additions, other than the alterations, changes and additions authorized by sections one, two and three of this act, in or to the yards and structures forming the terminals of the New York and Harlem Railroad company and the approaches thereto which may be necessary or required for the proper operation of trains in and through the Fourth or

Park avenue tunnel and in and upon the said terminals and the approaches thereto by some motive power other than steam; or which may be necessary or reasonably required in the proper conduct of the business, or in the proper management, maintenance, operation or use of the railroads and property owned or leased of said railroad corporations; provided, however, that all such alterations, changes and additions, other than the alterations, changes and additions authorized by sections one, two and three of this act, in or to the said yard and structures, terminals and approaches thereto, in so far as they shall in any manner affect any public streets, avenues or places, shall be made in accordance with plans and profiles which shall be first submitted by the said the New York Central and Hudson River Railroad company to the board of estimate and apportionment of the city of New York for its approval. If such plans and profiles are approved by the board of estimate and apportionment, such approval to be evidenced by resolution adopted by a majority of the votes in said board, a copy of such resolution, duly certified by the mayor and comptroller of the city of New York, shall be indorsed upon, or annexed to, each copy of such plans and profiles; and one copy of such plans and profiles, so approved, shall be filed with the board of estimate and apportionment of the city of New York, and the other copy shall be delivered to the New York Central and Hudson River Railroad company. Upon such plans and profiles or any modifications thereof made as hereinbefore provided, being approved and filed as aforesaid, any and all alterations or changes in streets, avenues or public places, or in the grade or grades, width or widths thereof, any and all modifications in or of the use of any existing street, avenue, highway or public place, or any part thereof, shown upon said plans and profiles, shall be deemed to have been duly authorized, and the map or plan of the city of New York shall be deemed to have been changed accordingly without any further act or proceeding by or on the part of the city of New York, or of any officer, board or department thereof, and the said board of estimate and apportionment shall thereupon cause three copies of said plans and profiles to be made and filed, one in the office of the register of the city and county of New York, one in the office of the corporation counsel of said city, and one in the office of the president of the borough of Manhattan, of said city. The city of New York acting by its said board of estimate and apportionment is hereby authorized and empowered, in its discretion, to agree with the New York Central and Hudson River Railroad company upon the consideration to be given or the amount of compensation to be paid to such city by such railroad corporation for such lands, rights, interests

or easements in lands as may be granted by said city as in this section provided; and also to grant such lands, rights, interests, or easements in lands to such railroad corporation by proper instrument in writing, either in perpetuity or for the period for which the same shall be required. Any pecuniary compensation agreed upon may either be a gross sum or it may be a sum or sums paid annually during the term of such grant. The New York and Harlem Railroad company, and the New York, New Haven and Hartford Railroad company, may be parties to such instrument. Such instrument shall be executed in as many parts as there shall be parties thereto, and on the part of the city of New York by its mayor and comptroller, under the corporate seal of the city of New York, and by the railroad corporation or corporations, parties thereto, under their corporate seals and by their proper officers. Such instrument may also include such other provisions in respect to carrying such plans and profiles into effect, not inconsistent with this act, as shall be agreed upon by and between the said board of estimate and apportionment and the said railroad corporations. When executed, one copy of such instrument shall be filed in the office of the comptroller of the city of New York, and one copy shall be delivered to each railroad corporation, party thereto. When executed and filed as aforesaid, said instrument shall be binding upon the city of New York and the railroad corporations, parties thereto, their successors and assigns.

§ 6. Upon the approval by the board of estimate and apportionment of any plans and profiles provided for in this act, the said city shall afford to said railroad corporations all such reasonable facilities as may be required to carry into effect the provisions of this act and any plans and profiles, and the provisions of any instrument, authorized by this act; and the proper officers and authorities of such city are hereby authorized, and it shall be the duty of such officers and authorities to take such appropriate action as may be necessary or reasonably required to carry the provisions of this act, and any such plans and profiles, and the provisions of any such instrument, into effect. All sewers, water pipes, gas pipes, electric lines, wires, ducts or conduits in or under the portions of the streets and avenue described in section one of this act, or which may be in, under or over any streets or avenues shown on any such plans and profiles, shall be changed or relocated, at the expense of the said railroad corporations, in such manner and to such an extent as may be necessary or reasonably required to carry the provisions of section one of this act, and any such plans and profiles, and the provisions of any such instrument, into effect; but all such changes and relocations shall be made in a manner approved by the board of estimate and apportionment.

§ 7. The comptroller of the city of New York shall, from time to time, when authorized by the board of estimate and apportionment, and without the concurrence or approval of any other board or public body, prepare and issue corporate stock of the city of New York, for the purpose of bearing and paying such portion of the cost and expense of constructing the viaducts and bridges mentioned in section one of this act, as is provided to be borne and paid by the city of New York.

§ 8. Nothing in this act contained shall have the effect of limiting or impairing in any manner or to any extent the existing rights, privileges or franchises of the railroad corporations, or either of them, now using the said tunnel, terminals and the approaches thereto, or of depriving in any manner or to any extent such railroad corporations, or either of them, of the use and benefit of such rights, privileges and franchises, except in so far only as such rights, privileges or franchises shall be expressly limited or modified by this act or in and by any instrument executed in pursuance hereof; and the said railroad corporations, or either of them, are hereby authorized and empowered to acquire by purchase or by condemnation, from any owner, and to take, hold, occupy and use for the purposes of its incorporation all real estate in fee, and all property and all rights, interests and easements in real estate or other property which may be necessary or reasonably required in order to carry out and into effect the provisions of this act, and any plans and profiles, and the provisions of any instrument or instruments provided for in section three of this act. All the powers in and by this act conferred upon the city of New York, the board of estimate and apportionment of the city of New York, and upon the said railroad corporations, may be exercised from time to time as occasion may require, and any plans and profiles approved and filed as in this act provided may at any time be modified, but not in any manner inconsistent with this act, upon plans and profiles showing any such modifications being submitted, approved and filed in the manner in this act provided.

§ 9. The provisions of any acts and parts of acts, including the Greater New York charter, which are inconsistent with this act, and in so far only as they are inconsistent with this act, shall have no application to the rights, powers and obligations conferred or created by or under authority of this act, or to any proceedings taken hereunder.

§ 10. The state of New York shall not be liable for injuries to persons or property in connection with any railroad or other construction which may be authorized under the provisions of this act, nor shall the state of New York be liable for any damages in any event for any act or omission of the city of

New York, or of the railroad corporations, or of either of them, mentioned in this act.

§ 11. This act shall take effect immediately.

CHAP. 639.

AN ACT to amend chapter four hundred and twenty-five of the laws of nineteen hundred and three, entitled "An act to provide for further regulation of the terminals and approaches thereto of the New York and Harlem railroad at and north of Forty-second street in the city of New York and of the public highway structures over said terminals and approaches and of the motive power to be used on said railroad."

Accepted by the city.

Became a law May 9, 1904, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Section eight of chapter four hundred and twenty-five of the laws of nineteen hundred and three, entitled "An act to provide for further regulation of the terminals and approaches thereto of the New York and Harlem railroad at and north of Forty-second street in the city of New York and of the public highway structures over said terminals and approaches and of the motive power to be used on said railroad" is hereby amended to read as follows, to wit:

SEC. 8. Nothing in this act contained shall have the effect of limiting or impairing in any manner or to any extent the existing rights, privileges or franchises of the railroad corporations, or either of them, now using the said tunnel, terminals and the approaches thereto or of depriving in any manner or to any extent such railroad corporations, or either of them, of the use and benefit of such rights, privileges and franchises, except in so far only as such rights, privileges or franchises shall be expressly limited or modified by this act or in and by any instrument executed in pursuance hereof; and the said railroad corporations, or either of them, are hereby authorized and empowered to acquire by purchase or by condemnation, from any owner, and to take, hold, occupy and use for the purposes of its incorporation all real estate in fee, and all property and all rights, interests and easements in real estate or other property which may be necessary or reasonably required in order to carry out and into effect the provisions of this act, and any plans and profiles, and the provisions of any instrument or instruments provided for in section three of this

act. All the powers in and by this act conferred upon the city of New York, the board of estimate and apportionment of the city of New York, and upon the said railroad corporations, may be exercised from time to time as occasion may require, and any plans and profiles approved and filed as in this act provided may at any time be modified, but not in any manner inconsistent with this act, upon plans and profiles showing any such modifications being submitted, approved and filed in the manner in this act provided. Any plans and profiles so submitted, approved and filed, which modify the method in this act provided for, of constructing the viaduct or bridge required to carry Forty-fifth street over the said tracks, so as to construct such viaduct or bridge either wholly or partly within the present lines of said street, or which modify the method in this act provided for of carrying Park avenue or any portion thereof from Forty-ninth street to Forty-fifth street over the said tracks shall not be deemed to be in any manner inconsistent with this act; but any modifications of such method are hereby expressly authorized; and in the place and stead of any portion of the viaduct or bridge required to carry the central portion of Park avenue over said tracks, in this act provided for, the New York Central and Hudson river railroad company may prepare and submit, and the board of estimate and apportionment of the city of New York may approve and cause to be filed in the manner and with the effect provided in section three of this act, plans and profiles of and for a viaduct or bridge not less than fifty feet in width, to be constructed westerly of the westerly line of Park avenue, and parallel thereto, and of and for another viaduct or bridge of equal length, and not less than fifty feet in width, to be constructed easterly of the easterly line of Park avenue and parallel thereto; and in case said two viaducts or bridges shall be constructed as a substitute for the viaduct or bridge, or any portion thereof, required to carry the central portion of Park avenue over said tracks in this act provided for, provision may be made for connections with one or both of such viaducts or bridges with any viaduct or bridge which the city of New York may construct for carrying the central portion of Park avenue from the northerly line of Fortieth street to the northerly line of Forty-second street; and in that case the said railroad corporations or either of them shall construct all of the said viaducts or bridges and connections north of Forty-second street, and the city of New York shall pay such part of the expense of the construction of said viaducts or bridges and connections as shall be agreed upon by and between the said railroad corporations or either of them and the said board of estimate and apportionment; and in any such case the said board of estimate and appportionment is hereby authorized and empowered, in its

discretion, to agree with the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, as to the use of such portion of Park avenue, lying between any such two viaducts or bridges, as shall be discontinued, or as to the use of any lands, rights, interests or easements in the lands forming any part of said discontinued portion of Park avenue, and by proper instrument in writing may grant to the said railroad corporations, or to either of them, any such lands, rights, interests or easements in lands, in exchange for the lands, rights, interests or easements in lands required for such viaducts or bridges; and the said board of estimate and apportionment is also in any such case hereby authorized to agree with the said railroad corporations, or either of them, from time to time as to the traffic which shall be allowed or permitted upon such viaducts or bridges and any roadways or driveways connecting the same.

SEC. 2. This act shall take effect immediately.

Supreme Court.

THE PEOPLE *ex rel.* THE NEW YORK AND HARLEM RAILROAD COMPANY, *against* WILLIAM F. HAVEMEYER, Mayor of the City of New York. } 47 How. Pr. 494, September Term, 1874.

(495) WESTBROOK, *J.*: The New York and Harlem Railroad Company was created by a special act of incorporation, passed April 25, 1831, and various acts amendatory thereof and supplemental thereto, have since been enacted.

Prior to the passage of the act of 1872 (to enforce a duty devolved upon the respondent thereby, as is alleged, is the object of this application), the relator had located, constructed and operated a double-track railroad upon the Fourth avenue, in the city of New York. This was with the consent of the corporation of the city.

By chapter 387 of the Laws of 1859, entitled "An act to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York," the corporation was "authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York Island to the south side of Forty-second street in said city, with turn-outs to their engine houses, respec-
(496) tively, for a period of thirty years from the 1st day of December, 1858."

Section 3 of the act just referred to "extended for the term of thirty years from the passage of this act, all the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April 25, 1831, subject to all the restrictions of the said act, except as herein modified."

Prior to the said act of 1859, the relator occupied the streets of New York with their railroad track, under a contract with the city, which bore date January 9, 1832. That contract enabled the common council of that city to determine when the railroad should become an obstruction and impediment to the enjoyment of the streets by the public, and to direct the railroad company to provide a remedy therefor under the penalty of the removal of its track.

When the Fourth avenue was originally occupied in part by the railroad, the sparseness of the population was such that such occupation gave but little inconvenience. As the city, however, expanded northward, it was found necessary to provide remedies for the danger and obstruction to the general public resulting from such occupation; and, with a view to a partial remedy, at least, by a law passed in 1867 (*chapter* 880), a portion of the avenue was arched over, leaving the railroad track below, at the joint expense of the city and the company. According to the evidence contained in the moving papers (and this is not denied), the completion of the work authorized by the act of 1867, was of great benefit; not only to the railroad company but to the city; so much so that it was deemed advisable to improve and grade the entire avenue, and, by means of sinking the tracks at points where it was practicable and bridging the avenue at others, to make the use thereof by the railroad company compatible with its proper use as a street by the public. To carry out this scheme the law of 1872, under which this proceeding is pending, was passed.

(497) By the first section of the act just referred to, the nature and character of the work which "the New York and Harlem Railroad Company is * * * authorized and required to" do is specified.

The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue, above Forty-second street, as may be necessary for the railroad business during the progress of the work;" and after providing for the removal of such temporary tracks when the work should be completed, it further authorized the company, "for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings-excavations in said avenue as may be required for such additional tracks, with landings

for the entrance and delivery of passengers outside of the said excavations and viaduct."

By the sixth section, a board, to be called "the board of engineers of the Fourth avenue improvement," was created, to take charge of, manage and direct the work. It is made the duty of such board "to file a monthly statement, under oath, of the items of their expenditure, with the comptroller of the city of New York." By the same section, the members of the board are named, "Allen Campbell, Alfred W. Campbell, or their successors, and the chief engineer of the board of public works of the city of New York, and the engineer of the New York and Harlem Railroad Company"; directions are given for the keeping of minutes of their transactions; their compensation is fixed; provision is made to fill vacancies, and for the appointment of a general superintendent of the work. They are required to prepare plans and specifications of the improvement "and an estimate of the expense thereof, and file a copy of such plans, specifications and estimates in the office of the comptroller of the city of New York." And they were further required to take an oath, or affirmation, faithfully to perform their duties.

(498) Section 7 provides that one-half of the cost of the work shall be borne by the New York and Harlem Railroad Company, and one-half by the city, as the work progresses, and, "when, and as often as it shall appear, by the certificate of the superintending engineer of the work upon said improvement, that the sum of $25,000 has been expended thereon by the New York and Harlem railroad (specifying the portions and divisions of the said improvement), when the said expenditure has been made the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement, to be borne and paid by the said city, as aforesaid."

Section 8 provides that the one-half of the estimated cost of the improvement which is to be borne by the city shall be raised by taxation upon the real and personal property, and one-half thereof shall be included in the tax-levy of 1872, and the other half in the tax-levy of 1873. The comptroller of the city is directed to issue revenue bonds to meet the amount to be paid by the city; and the section thus concludes: "it is hereby intended and declared that the payments by the city of New York are to be made in the proportion, and as fast as they are made by the said railroad company, during the progress of the work or the said improvement."

By the ninth section the city of New York is "forbidden to obstruct the said improvement, or the use of the Fourth avenue for that purpose, above Forty-second Street"; and the common council is "directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement."

By the tenth section the board of engineers is charged with completing the improvement as rapidly as possible, and when completed the New York and Harlem Railroad Company
(999) and such other companies as obtain from it a right so to do, are authorized to run trains, by steam, over the various tracks, &c.

After the passage of this act the relator proceeded, under the direction of the said board of engineers (which board has pursued each and every step required by the law to be taken) to make the improvement.

The city of New York raised by tax, including it in its tax-levy of 1872, one-quarter of the whole estimated cost of the improvement; and there was collected and paid into the treasury of the city, the sum of $1,580,767.50, to meet its share of the cost of the work.

By the act of April, 1873, payments by the corporation of the city of New York must be made through the proper disbursing officer of the department of finance, on vouchers, to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller and countersigned by the mayor. Connected with the finance department is an audit bureau, which, under the supervision of the comptroller, is required to audit, revise and settle all accounts in which the city is concerned as debtor or creditor, the chief officer of which is called the auditor of accounts.

On the 14th day of May, 1874, a certificate, precisely in conformity with the provisions of the act under which the improvement is making, was made out by the superintending engineer, and delivered to the comptroller of the city of New York, certifying that $276,466.70 had been expended upon the improvement, specifying the portions and divisions of the same where the expenditure was made.

The auditor of the bureau of accounts (Abraham L. Earle) having duly examined the certificate, certified a claim for one-half thereof to the comptroller, which latter officer drew a warrant for one-half the amount of the certificate of the superintending engineer, to wit: for $138,233.35, and duly signed the warrant; which warrant was also countersigned by the mayor.

(500) After the mayor (William F. Havemeyer) had countersigned the warrant, which, as before stated, was also signed by the comptroller (Andrew H. Green) he caused his

name to be taken therefrom, and now refuses to countersign the same, though he has been requested so to do.

The money wherewith to pay the said warrant was then, and is now, in the treasury of the city, and the application by the relator is for a peremptory mandamus against the respondent, to compel him to countersign the said warrant.

No disputed question of fact arises upon this application; no question of fraud, collusion or attempt to cheat the city out of a dollar is urged. There is no pretense but that the board of engineers has honestly, conscientiously and impartially done its duty, and that the warrant drawn by the comptroller which the mayor now refuses to countersign, represents just one-half the money actually and judicially expended by the relator in making the improvement required by the law of 1872. On the contrary, the opposition to the mandamus is based upon three grounds only: First, that a mandamus is not the appropriate remedy; second, that the certificate includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for one-half of which the city is liable; and, third, that the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument, and which will be noticed in detail hereafter.

The full statement of the facts, which has been given, readily shows that there is here no question of fact to be sent to a jury for trial, and therefore, no alternative mandamus need be granted. The amount of money due from the city has been adjusted, determined and ascertained by a tribunal specially organized and created for that purpose, and which, composed as it was of men of conceded integrity, ability and learning, acting under the sanctities of an oath, was infinitely
(501) better qualified to discharge that duty than any court or jury possibly could be. Unlike a court, which, to ascertain facts, must rely upon the evidence of others, this board had personal knowledge of the truth and right of their judgment, the work having been done under their supervision and according to their plans. Unless, then, this application must fail and be defeated for the objections taken and hereinbefore stated, there is no reason why this court should not and ought not to dispose of the whole case, as involving questions of law only, and, if its views coincide with the position of the relator, grant the writ asked for in a peremptory form.

The objection that a mandamus was not the proper remedy was argued preliminarily and disposed of prior to hearing the argument upon the merits. It may not be improper, however, as this case is one of great interest, to state, briefly, the reasons which influenced that decision.

Assuming the validity of the act of 1872, the doing the work, the honest expenditure of the money and all the facts set out in the moving papers (all of which must be assumed in disposing of this preliminary objection), a plain duty was imposed upon the respondent by the statutes of this state—one which was imperative and mandatory—the non-discharge of which worked gross wrong and injustice to the relator. No other remedy was adequate and proper to meet the case. The taxpayers, and all the officers of the corporation, other than the respondent, had faithfully and completely discharged their various duties. The money had been collected and paid into the city treasury, the auditor, under the direction of the comptroller, had certified to the justice of the claim; the comptroller had drawn his warrant for the amount, and the only obstacle to its payment was the want of a countersignature by the mayor, who (all this must be conceded in asking a refusal of the writ on this ground), without reason and without cause, declines to affix his name to a warrant, which the law declares he shall do. What other remedy will meet this case? Granting for the sake of argument, that (502) an action could be maintained against the corporation, for labor performed and moneys expended, under the act (which, as the law specially provides for the ascertainment of the claim, the mode of raising the money and its payment, I do not believe), what propriety is there in subjecting the municipality of the city of New York, as well as the relator, to the cost and expense of an action at law, to enforce a claim which every tax-payer and officer thereof, except the mayor, desires to have paid, and has done all in his power to have discharged.

Within every principle which has ever been held upon the writ of mandamus, it must be the proper remedy. No other will reach the evil, and devolve the costs of the proceeding where they belong, if the points urged upon the merits do not justify the mayor in refusing to perform the official act.

The reasons which influenced us in holding that a mandamus is the appropriate remedy in this proceeding, are fully sustained in *The People agt. The Supervisors of Columbia County* (10 Wend., 363), and *The People agt. Mead* (24 N.Y., 114; *see pages* 120, 121, 122, 123). In the latter case, Judge Denio, in commenting upon some decisions which have been strenuously urged to this court, says: "But I do not think these cases are fully in point against the plaintiff. None of them present a case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors when that proceeding has been carried on according to law nearly to its completion, where it has proved effectual in raising the money from the tax-payers, who were the proper parties charged with

its payment, and when the only step wanting to produce satisfaction to the creditor is the payment of the money so raised into his hands. If the defendants are allowed to persist in refusing to make payment on the ground that the relator has a right of action against the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected
(503) from the tax-payers and placed in the hand of a public officer for the purpose of being paid to its creditors — all in the performance of specific statutory directions—but when, in consequence of the perversity of the official person whose duty it was made to pay it over, it could not be obtained by the creditor." This is the exact course of argument which influenced us in overruling the motion to dismiss the proceeding upon the ground that the remedy asked for—a mandamus—was not the appropriate one; and with a single further citation from the same opinion of judge Denio, in which he comments upon the other case we have cited (*The People agt. The Supervisors of Columbia County*), we close the discussion of this preliminary objection: "If the opinion should be thought to go too far in denying the liability of the county to an action, still, the case is an authority for holding that when a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus."

But it is further objected (and this objection goes to the merits of the application), that the certificate given by the superintending engineer, and for the one-half of which the comptroller of the city drew his warrant, includes items not properly chargeable under the act of 1872, to the cost of the improvement. If this objection be well taken, the amount of the illegal charges embraced in the certificate is of no consequence, and hence the application for a reference to ascertain the exact amount of such improper charges was refused. The certificate could only include such items as the law aforesaid authorized, and if it was made up in part of sums unauthorized, the application for the writ would be refused if such amount was great or small. The items objected to are: 1st. The cost of maintaining temporary tracks to run the trains whilst the work progresses; 2d. The necessarily enhanced cost of doing the work whilst a portion of the avenue is occupied by operating the railroad; and to obviate which it
(504) is claimed that the trains should have been stopped at the Harlem river. 3d. The construction of two additional tracks to secure rapid transit; and, 4th. The ten per cent., which in the estimate of the entire cost of the improvement

is allowed for contingencies. In regard to the latter item, no part of it enters into the certificate for which the comptroller drew his warrant—that representing money actually expended. The appearance of this in the general estimate of the whole cost of the work made prior to the commencement of the undertaking was proper and usual, to apprise those interested of the possible amount of money required. It was placed where it was so that a sufficient sum might be raised to cover any expenditure which the proper performance of the work made necessary, and to make the fund, against which the certificates were thereafter to be given, adequate for their payment. As to the other items something further will be said.

To the second point—that the cost of the work is necessarily enhanced by the occupation of a portion of the avenue during its progress by the operation of the railroad thereon south of Harlem river, and which increased cost by reason thereof, is admitted—the act itself furnishes a sufficient answer, in plain terms. The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue above Forty-second street as may be necessary for the railroad business during the progress of the work. From this express permission the inference is irresistible that the work was to be carried on with the Fourth avenue occupied in part by the business of the railroad. The legislature evidently supposed, as we can readily conceive, that the city was vitally interested in the uninterrupted flow of its commerce through this as one of its great arteries, and that such uninterrupted flow was of more pecuniary consequence to it than the enhanced cost caused by its interruption. If allowed to judge of the soundness of this legislative opinion, we would cheerfully announce ours to be in accordance with theirs. But we are not, as the
(505) fundamental law of the state has wisely committed such considerations to the sound wisdom and practical sense of the legislative department of the government; and it would ill become the judicial branch to say that such discretion could be lodged anywhere with more propriety or more safety.

As to the other two objections—the cost of the temporary tracks and the two additional permanent tracks to secure rapid transit—we think that they are not well taken. The first five sections of the act designated the improvement to be made, and what may and should be done during its progress. Among these is the one which provides for doing the very things, to the imposition of one-half of the cost of which upon the city objection is made. It is impossible to separate these acts from the others which are directed to be performed. After the character, nature and extent of the work has been indicated in these five sections, the next (the sixth) creates the board of engineers, "to execute, direct and superintend the construc-

tion of said improvements," and then sections 7 and 8 prescribe the share of the cost of "the said improvement," which the city is to sustain, and direct how the money shall be raised and paid out to accomplish the object. No rule of construction would justify the limitation attempted upon the words, "the said improvement." All had been previously specified as a part thereof, or as proper to be done in connection therewith; and if the legislature had intended that the city should bear one-half the expense of only a part of the work previously authorized or directed, it would certainly have so declared, and not use an expression which must necessarily cover all.

Neither does this construction work so great injustice to the city as the learned counsel for the mayor argues. The legislature of the state (*The People agt. Kerr*, 27 N. Y., 188) had power to authorize the relator to occupy the Fourth avenue with its tracks, and prescribe the mode of occupation. The permission to run cars over it, drawn by steam power, had been expressly conferred in 1859. Whatever control the city
(506) had over its occupation by virtue of the contract with the company, was given to it by the law chartering the company. It was perfectly competent for the same body, under whose permissive authority the city acted, to deprive it of that power and deal directly with the relator. It did so by the act of 1859, which unconditionally conferred the right claimed by the railroad. Such permission was not, as the learned counsel for the mayor argued, subject to the restrictions imposed by other acts, under and by virtue of which the city had undertaken to control the corporation in the use of the avenue; but such restrictions existed only, as the act declares, "except as herein modified." The act having in prior parts made express provision for the laying down of tracks, and the running of cars thereon by steam, and that, too, with the consent of the city, as it expressly declares; such use, granted for a term of years in an unqualified manner, must be deemed to be at least one of the modifications referred to. When the act of 1872 was passed, the legislature had before it the situation and rights of both the city and the relator. The former was vitally interested in the success and maintenance of the latter. The iron rail and the steam horse, which linked it to the great country of which it was the commercial center, were as important and vital to its growth as any of its other avenues which its wealth and enlightened public spirit have constructed. The improvement of this avenue, so as to admit of its use by the public and the railroad together, and the apportionment of the cost thereof upon some just basis, were the problems to be solved. Much of the work to be done properly belonged to the city, and much to the railroad. A separation of the one from the other in its execution would enhance the cost of

it as a whole, even though the part properly belonging to each could be accurately designated. Under such circumstances the law was passed by which the work was to be prosecuted as a unit, under one plan and a single superintendence, while the cost was equally divided between the two. If a part
(507) of the whole can be selected and an argument based upon it to prove the city pays a part of something it ought not to bear, so, on the other hand, doubtless, the railroad company might argue, as to some other part, that it paid for something which benefited the city only. The truth is that the work so runs together that its separation is impossible; and since the propriety of its execution is conceded by all, the apportionment of its cost could only be made by the legislative power in the exercise of its best judgment. We think it has acted wisely, equitably and justly; but if it has not, neither this nor any other tribunal has power to correct its errors. The work, when completed, will certainly not benefit the railroad company only, but the city equally as much. The exact proportionate benefit which each will receive can never be accurately ascertained. It is enough to know that both will feel that the money expended has been judiciously employed, and a division made of its cost by a body empowered to decide that question.

Having endeavored to show that the remedy sought is an appropriate one, and that, if granted, the city will not pay anything unauthorized by the law of 1872, let us now examine the various objections founded upon our federal and state consitutions. It is claimed:

First. That it violates the clause of our national constitution, forbidding any state to pass a law impairing the obligations of any contract. It is argued that as the contract of January 6, 1832, between the city and the company, gave to the former the right to control the use of the avenue by the latter, the act of 1872, which takes from the city this power of control, substantially abrogates this agreement. To this we answer: First, whilst discussing the previous objections, it was shown that the contract was annulled with the consent of the city, by the law of 1859, which definitely conferred the right to use the avenue by the propulsion of cars, over the tracks constructed upon its surface, by steam. This grant was
(508) absolute, and absolved the company from its contract of 1832, which had therefore ceased to exist when the present statute was passed; second, assuming that the old contract of 1832 was in force when the present statute was passed, it was competent for the city, if the old agreement was thereby improperly nullified, to make its objections. It, as a natural person, can waive its right, and assent to a change or modification of its bargains. Like a natural person, it cannot fold its arms and make no objection when it ought to speak.

It saw the machinery of the law being put in operation by an estimate of the cost of the work filed in the office of its chief financial officer, and in all that was done before the work began, and in the conduct of the same to the present time, one of its own principal officers (the chief engineer of the board of public works) took a leading and active part. No objection or notice is given to the relator that the provisions of the law are not in good faith accepted; on the contrary, it is allowed to make a contract, on the faith of a supposed acquiescence by the city, involving millions—the tax imposed is levied, collected and paid into the city treasury—hundreds of thousands of dollars are paid by the city in ratification of the new agreement which the law embodies; and now, at this late day, this objection is made after every tax-payer and every officer of the city—not even excepting the mayor, who is now objecting—has expressly ratified and confirmed it. So far as it is possible for any being, natural or artificial, to waive any prior agreement, if one existed, the city of New York has done so, and the point now, for the first time taken, cannot prevail. But, third, the city has no rights under the contract of 1832, so far as the use of this avenue by the relator is concerned, which the state was constitutionally bound to respect. The city, as we have shown under a previous point (*People agt. Kerr*, 27 N. Y., 188), had control over the occupation by the railroad of the street by the force of a power conferred. The body which gave it the power could withdraw it and exercise
(509) it for itself. It has done so, and that takes no inherent or vested right from the city.

SECOND. It is said that it violates section 16 of article 3 of the constitution of this state, which declares: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." The title of the act is "An act to improve and regulate the use of the Fourth avenue in the city of New York." The cases of *Brewster agt. City of Syracuse* (19 N. Y., 116), and of *Ferdinand agt. Mayor*, (50 N. Y., 504), cover this objection. In the latter case it is decided, "if the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provisions of the constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in the title (*state constitution, art.* 3, Sec. 16), is complied with. The degree of relationship of each provision is not essential if it legitimately tends to the accomplishment of the general purpose." And it was also in that case further held, "the general subject of local improvements includes not only the plan and construction

of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction." Tested by these rules there is no difficulty. When this law was passed, the public and the railroad company were in the joint use of this avenue, and the act declared by its title its object to be to "improve and regulate" its use. No improvement could be made without cost to some one, and the reader of such title would naturally conclude that a tax would be levied somewhere to pay such cost; and as the use was principally confined to the two corporations, it could reasonably be conjectured where it would fall. And further, as the public and the railroad were both using the avenue, the
(510) portion of the title which indicated that its use was to be regulated would naturally direct attention to the body of the act to ascertain how it was thereafter to be used. Every section of the act relates to this single object, and the title could not be made any more specific without incumbering it with the details of the machinery devised for its execution, which the framers of the constitution did not contemplate, and did not intend.

THIRD. It is further argued that the law is in conflict with section 13, article 7, of the constitution, which declares: "Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

If this objection is to prevail, what becomes of all the various statute laws authorizing city and village corporations throughout the entire state to make local improvements, appoint boards to assess and determine the cost, &c.? What of various others creating special commissioners to ascertain and assess debts and damages due third parties from counties, towns, &c., and then directing the levy and assessment thereof upon the locality which should pay? If the legislature can authorize a municipality to make an improvement, appoint commissioners to ascertain and distribute its cost among those which in their judgment should bear it, and in such proportions as they think proper—why can it not, instead of delegating such power to others, act directly, and determine that a certain improvement shall be made, establish a board to direct and control its execution, apportion its cost as it thinks proper, and provide for its payment? Is there any greater exercise of power in one case than in the other? If the power to do an act can be legally conferred, the body which can make the grant can exercise the right itself.

In *People agt. Mayor of Brooklyn* (4 N. Y. 420), by virtue of the power conferred in the charter of the city, Flushing
(511) avenue had been improved, and the cost of the improvement assessed in part upon certain parties supposed to be especially benefited, it was held this was a proper exercise of the taxing power. Will it be argued that, if an act of the legislature had directly ordered the same improvement, had created a board to plan and execute the work, and had declared in the law itself what proportion of the cost the whole city should pay and what part specific corporations and individuals should bear, that such act would not be equally valid with the one it did pass?

In *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y. 143), it was held that a law of the state appointing commissioners to ascertain the amount due from the town to certain parties, and directing the assessment of the amount awarded by the board of supervisors of the county upon the town, was a valid and constitutional enactment. That case, which, like the one we are considering, provided for the assessment of a tax, the amount of which was to be ascertained by the means specified therein, was certainly unconstitutional if the act of 1872 is, for the reason we are discussing.

Whatever plausibility the objection may have from the words of the section and article of the constitution upon which the same is predicated, and whatever apparent contradiction there may be between it and the case we have cited, are explained by the remarks of Denio, Ch. J., in *Darlington agt. Mayor, &c., of New York* (31 N. Y. 164; *see pages* 182, 183), who in commenting upon the same article of the constitution to which the learned counsel of the mayor has referred, says: "The article of which the section is a part relates to the state finances, and, taken together, it constitutes the financial system of the state, so far as concerns constitutional restraints. The affairs of cities and counties, so far as they are regulated by the constitution, are treated of in other provisions." And precisely this explanation disposes of *People agt. Board of*
(512) *Supervisors of Kings County* (52 N. Y. 556), in its applicability to the case before us. The court had then before it a law imposing a state tax for state purposes, and that law was, of course, amenable to the article of the constitution regulating that species of legislation. Its soundness is not questioned, but it does not sustain the point urged now.

FOURTH. The objection that the creation of the board of engineers to superintend this work is a violation of article 10, section 2, of the constitution, in relation to the appointment of certain officers, cannot prevail. If the point be well taken, then *The Town of Guilford agt. The Board of Supervisors of Chenango County* (13 N. Y. 143), before cited, was wrongly

determined. In that case the court of appeals had before it the constitutionality of a law appointing commissioners to determine the amount of a tax to be levied. So, also, if the position be sound, *Litchfield agt. Vernon* (41 N. Y. 123) and *People agt. Lawrence* (41 N. Y. 137), were wrongly decided. In these cases the constitutionality of an act creating a special board of commissioners to do certain things relating to the closing of the Atlantic street tunnel in the city of Brooklyn, and to assess the cost thereof, was affirmed.

It would not be difficult to answer the objection were it an original question; but such a discussion is neither profitable nor necessary in view of adjudged cases, which this court has no power to reverse.

FIFTH. Neither is the law obnoxious to the first article of the constitution, section 9, which provides: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." No "public moneys," in the sense in which the word "public" is used in that part of the organic law, are appropriated so as to make a two-thirds vote of the legislature necessary. The use of the words "public" and "local" in the same section forbids the thought that they are synonymous expressions, and the
(513) structure of the whole sentence is in opposition to the construction which attaches to each a similar meaning. It was very easy to say, if that was the thought intended, that "no tax shall be imposed for a local or private purpose upon the state or a locality, except by the vote of two-thirds of the members elected to each branch of the legislature." Instead of that, the expression indicates, as well as the requirement, that the assent of two-thirds of the members was necessary when the money belonging to the whole state was to be appropriated for the benefit of a part. This construction makes the provision reasonable and proper, and demonstrates that the "public moneys" referred to in the section are those belonging to the state, and that the clause of the constitution cited is no limitation upon the power of the legislature to assess or tax the cost of a local improvement upon a locality. Neither by the law is any "private property * * * * taken for any public use," so as to make article 1, section 6, of the constitution applicable. Taxation upon a locality for an improvement therein is the exercise of a different power—the taxing power—whilst the constitutional provision just cited refers to the taking of property by the right of eminent domain. This distinction, ever since the able and exhaustive opinion of Ruggles, *J.*, in *People agt. Mayor of Brooklyn* (4 N. Y., 419), wherein it is most clearly stated and explained, has been well recognized in this state, and repeatedly followed since.

SIXTH. The last objection urged is that "chapter 702 of the Laws of 1872 is also unconstitutional and void in so far as it imposes the payment of this money upon the city of New York for the benefit of the Harlem Railroad Company, as the compelling of such payment is beyond the scope and purview of the legislative power."

Assuming the truth of the statement contained in the point urged, that the tax is for "the benefit of the Harlem Railroad Company," the objection is still without force. There is no such limitation on the taxing power of the legislature. In
(514) *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y., 143) before cited in answer to an objection that the law imposing the tax was a mere gift to the parties in whose favor it was imposed, judge Denio said: "The legislature is not confined in its appropriation of the public money, or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity." In *Litchfield agt. Vernon* (41 N. Y., 123), also before quoted, judge Grover (*page* 134), speaking of the previously cited case, says: "In that case it was held that the legislature had the power to impose a tax upon the inhabitants to pay a claim that had no legal validity, and that could in no way be enforced against the town. In other words, that it was in the power of the legislature to impose a tax upon a locality for any purpose deemed proper, and that its power, in this respect, is not restricted by the constitution of the state." The opinion of Mason, *J.*, in *People agt. Lawrence* (41 N. Y., 137, *see pages* 140, 141, 142), is to the same effect. The case of *People agt. Batcheller* (53 N. Y., 128) does not conflict with these views. It simply decides that a law requiring a town, without the consent of its inhabitants, to become a stockholder in a railroad company, is unconstitutional.

But the objection assumes a fact which is not true. The provisions are not for the benefit of the relator, exclusively. This we have heretofore endeavored to show in this opinion. The proper improvement and use of the avenue by both the city and the railroad, and to make the one consistent with the other, were the results to be obtained. What part of the work justly belonged to the city, and what to the relator, it was difficult to define with accuracy; and the work to be done by each was so interlaced, that it was deemed wise to direct its construction under a single plan. Perhaps, from parts of this work the railroad receives the larger benefit, and from others the city. The legislature in its wisdom has assessed the one-
(515) half part upon each. This power is nothing different from what is exercised in behalf of municipal corpora-

tions every day. A street is opened and graded through agricultural lands. In such a case the amount to be paid by the city or village, as a whole, is always considerable, and yet the objection was never made, or if made, has never prevailed, that it was unconstitutional to tax the entire municipality for work, a part of which, at least, benefited individuals only. Such owners are presumed to pay for that part which specially benefits them in the assessments, which they pay for such benefits over and above their share of the general tax, to which they also contribute. So in this case the legislature has determined that one-half the cost of the improvement, over and above its proportion of the tax levied upon the city, should be paid by the relator as its share of the peculiar benefits resulting therefrom. It is not for this court to say that this apportionment is unjust. To that body, as the supreme arbiter under our constitution, has the right to decide been committed, and with its decision this court has neither the power or inclination to interfere. Doubtless, in the exercise of these great powers they will often err, as any tribunal, which is but human, will; but no system of government has ever yet been devised, and none ever will be established, which shall, in any department, always do exact justice, and whose lawful powers, if stretched to their fullest extent, might not work injustice in particular cases. In the grant of power, much must be conceded to the discretion, good sense and integrity of the individual or body to whom it is granted; but the concession of that which is fairly given should never be witheld, because extreme cases can be supposed in which it might be exercised with danger to the public. Practically, it will generally be found that the danger is largely imaginative, and the injury claimed to be done scarcely perceptible.

Before closing this opinion, it may be well to advert to another view, applicable as much to each of the objections urged, as to the particular one in connection with which it has been hereinbefore stated.

(516) Statutes and constitutional rights existing in favor of a party, natural or artificial, may be waived. May not the act of 1872 be regarded as the embodiment of an agreement between the parties, to which all have assented—upon which all have acted—and the withdrawal of either from which cannot be permitted, because by its conduct it has induced the other to incur responsibilities which, it may fairly be assumed, would not have been incurred if the other had not assented? The relator accepted the law by making the contract for the work, which the act required it to make. The city, through its officers, accepted it, by no protest against its provisions; by allowing the chief engineer of its board of public works to become a member of the board of construction, which

directed the work and controlled the expenditure; by using its machinery for the collection of taxes, to assess, levy, collect and receive into the city treasury its one-half of the cost; by drawing warrants and paying over a million dollars thereon; and, through its citizens by the payment of the tax levied for the city's share of the cost. Thus, all parties have agreed,—the city through every officer and every tax-payer. No rule of law and no rule of honesty, should permit objections to prevail which have been so fully and explicitly waived.

As against the respondent, however, the strength of the point founded upon the acquiescence of the city in the law of 1872, has not yet been stated. Every tax-payer in the municipality has not only assented to the act, but actually executed it. As a law imposing a tax, if it may be so regarded, it has already spent its force by the assessment and collection thereof, and the obtainment of the money for this purpose only. Every tax-payer has actually paid his, her and its proportion of the amount which the city was to pay of the cost of this great improvement into the city treasury, and all, except that part which has been paid over in execution of the law, still remains therein pledged to this object. It cannot be used for any other purpose without a fraud upon the parties from whom it was collected, and who paid it that this work should
(517) not fail. When the mayor refuses to countersign this warrant as the law commands, he refuses, not in order to protect his constituency from money oppressively to be taken against their will, but to defeat their wishes, and to appropriate their means to some use other than that to which they have pledged and dedicated it. His action in so doing is not only contrary to the desire of the relator, but to that of the body of the people whom he professes to represent and whose voice he should obey. The citizens of New York have a right that their means shall be used for the very purpose to which they have applied them, and none of their officers should be allowed to refuse to execute the trust which tax-payers, under the law, have committed to their official hands, in the belief that the provisions of such trust would be faithfully executed.

The result of my examination is, that the peremptory mandamus asked for should issue.

Supreme Court—General Term.

FELICE TOCCI, Appellant, *against* THE MAYOR, ETC., OF THE CITY OF NEW York, the New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, Respondents.	73 Hun, 46. November Term, 1893.

VAN BRUNT, *P. J.*—This action is brought by a tax-
(47) payer to restrain the city officials from paying to the railroad companies, defendants, certain moneys under the provisions of chapter 339 of the Laws of 1892, upon the ground that it imposes upon the city a contribution to the private railroad structure belonging to the defendant railroad companies, and is, therefore, unconstitutional. Upon the application for an injunction *pendente lite* affidavits were submitted upon both sides, and certain material facts controverted in those affidavits. In cases of this description it is much better practice where the right to a preliminary injunction has been denied, and there are disputed questions of fact, that the party should go to trial and settle the facts, and there determine the question as to the right to an injunction, rather than to attempt to procure a decision of the General Term upon a state of facts which may be entirely changed upon the trial, and unless a very clear case is made by facts which could not be found to be different upon the trial such an order should be affirmed.

In the case at bar upon an examination of the papers upon which this application was founded, and the answers thereto, it seems to us that there is no possible reason for our interference with the court below. The whole fallacy of the plaintiff's action is the assumption that the contribution of money by the mayor, aldermen and commonalty of the city of New York to the enterprise in question is a contribution to a private use. On the contrary, it would appear that it is a payment upon the part of the city for benefits and privileges received; and with the question as to whether the city has paid a high or low rate for what it has acquired we have nothing to do.

It appears that the defendants, railroad companies, were,
(48) prior to 1872, the owners of and operating on Fourth Avenue in the City of New York, steam railroads from Forty-fifth Street up to and across the Harlem river. In 1872 an act was passed giving the New York and Harlem Railroad Company a statutory grade between Forty-fifth Street and the Harlem river, an increased width of depressed roadway, and where the said roadway was to be in tunnel giving to the city and the people the full width of Fourth Avenue between Fifty-sixth and Ninety-sixth streets. Between Ninety-sixth street and

Harlem river, the railroad structure was to be upon a viaduct and in a cut inclosed by sidewalls with undercrossings between One Hundred and Second and One Hundred and Thirteenth streets inclusive, and over crossings from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive. The said railroads crossed and were to cross the Harlem river slightly above highwater mark. By this act the railroad companies were given the exclusive use and occupation of said road, and persons were prohibited from entering or passing upon the same, or any portion thereof under a penalty. In 1890 an act of Congress was passed providing that the Secretary of War should cause the low bridges then crossing the Harlem river to be replaced by other bridges at the expense of the owners thereof *as soon as the necessary legislation*, if such legislation were necessary, should enable the change in grade to the approaches of said bridges to be made, the owners of said bridges to be allowed a reasonable time in which to complete the work necessary for such bridges, and said bridges to have a clear space between the under side thereof and the high water of spring tides of twenty-four feet.

To enable the railroad companies to comply with the act of Congress all that would have been necessary to be done, was to change the grade from One Hundred and Twenty-fifth street to the Harlem river, which would have been much less expensive to the companies than the plan hereinafter mentioned, provided for by the act of 1892. But had this method been adopted, no part of Park Avenue would have been returned to public use, and it would not have permitted the free and unobstructed passage of the intersecting streets from one side of the city to the other.

In 1892, in order to enable the said railroad companies to comply with the requirements of the act of Congress,
(49) the Legislature passed an act changing the grade of the road from One Hundred and Sixth street to and over the Harlem river to One Hundred and Forty-ninth street, making in the act various requirements in respect to the plans, specifications and estimates for said work, and to the method in which the work should be done. The act further provided that when the plans, specifications and estimates should be made and filed as therein required, the expense and cost of the improvement should be borne and paid by the defendant, the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progressed. The act further provided that when and as often as it should appear by the certificate of the superintending engineer of the work of said improvement, duly

certified by a board provided to be appointed by said act, that the sum of $25,000 had been expended thereon by either of said railroad companies, specifying the portions and divisions of said improvement where the said expenditure had been made, the comptroller of the city of New York should draw his warrant, etc., for one-half of the same. The act further provided that in no event should the proportion of the cost of said improvement to be paid by the city of New York exceed the sum of $750,000, and that if the cost of said improvement should exceed the sum of $1,500,000, then the entire cost over and above such sum should be borne and paid for by said railroad companies. And, further, that said improvement structure and bridge should be exclusively for the uses and purposes of the railroad companies, and it should not be lawful for any person or persons other than a public officer in the execution of his duty as such, with his agents and assistants, to enter and pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for such purpose, with the consent of such corporation, under the penalty of a fine, this provision being the same as that contained in the act of 1872.

It is urged upon the part of the appellant that the contribution imposed upon the city by the statute of one-half the cost of the structure from One Hundred and Sixth street to
(50) the river, declared to be exclusively for the uses and purposes of a private railroad company, is illegal and in violation of the Constitution. And our attention is called to the provision of the Constitution which, so far as it is applicable to the question now before the court is as follows:

"No * * * city * * * shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, * * * nor shall any such * * * city * * * be allowed to incur any indebtedness except for * * * city * * * purposes."

The argument of the counsel for the appellant is that the statute under consideration provides that the city shall contribute practically to two material works: *First*, the construction of a railroad structure, which is expressly stated to be exclusively for the use of the defendant company, that is, the New York and Harlem or the New York Central and Hudson River Railroad Company, and, *secondly*, the filling in, regulating and paving under that structure of some space and street crossings from One Hundred and Fifteenth street to One Hundred and Thirty-third street, and making the same part of the public avenue; and that if the second purpose is not within the prohibition of the Constitution, yet if it has been so inextricably mixed in the statute with the first purpose,

which is within such prohibition, that it is inseparable, and the entire provision is vitiated. It is further urged that in the case at bar, however, the purposes and objects are not so mixed as to defy judicial discrimination, either in principle or in fact, and, therefore, the unlawful can and must be set aside; for the provision, so far as it prescribes the contribution to the ostensible public work of filling in, regulating, etc., can be readily separated from the part imposing upon the city the payment of one-half the cost of the private railroad structure declared to be for the railroad's exclusive use and purpose.

We think, however, that in this statement of propositions the essential features of the improvement are lost sight of by the appellant. It is undoubtedly true that the expense attendant upon the opening, filling in, regulating and paving of Park avenue, released by the elevation of the defendant's railroad tracks, can be separated from the expense of building such elevated tracks. But this is by no means the whole of the improvement, nor is it the part of the improvement in
(51) which the city is most largely interested. These railroad companies were in exclusive occupation of a part of the public streets of the city of New York. It was deemed by the Legislature advantageous to the city of New York that such occupation should cease, and that these portions of the streets should be restored to public use, and that the interruption of communication between the two sides of the city should terminate; and they considered that the advantages to be derived from these changes and the others to be made by the railroad companies, which the Legislature had no power whatever to enforce upon said companies, were of sufficient importance to the city of New York to justify its payment of one-half of the expense of the improvement up to $750,000. It is entirely immaterial in the consideration of this question whether the railroad company owned the fee of the land which they occupied or not. For all practical purposes they were its absolute owners, and entitled to its absolute control and exclusive use for the purposes of their railroads. It was for the abandonment of these rights, and the expense of other constructions in their stead, that the city was authorized to make the payments provided for by the act.

The provision of the act, in regard to the payments to be made, that the certificate of the superintending engineer of the work of the improvement should specify the portions and divisions of said improvement where said expenditures had been made, was simply a method of determining as to how much money, under the provisions of the act, the city at any one time could be called upon to pay towards the improvement.

It was a matter of considerable moment to the city of New York as to whether unobstructed communication should be had

between the different sides of the city from One Hundred and Fifteenth Street to the Harlem River. The improvement was but one work. There were different things to be done in carrying out its design. But merely because a portion of the improvement required either the removal or the bringing upon the ground of earthy material, and another portion required the bringing upon the ground and the erection of iron structures, by no means segregated the parts of the improvement. They were, each and every of them, necessary parts of one design. The elevation of tracks and the improving of the street were parts of the same work; and it is to this (52) one work that the city contributes. Even though the claim that the city contributes to the private structure of the railroad were true, if in consideration of such contribution the railroad surrenders rights which it had to public streets and avenues, and the Legislature chose to permit the city to buy out such rights by contributing to the expenses incurred because of such surrender, we see no possible constitutional objection thereto. It is merely paying a consideration for substantial advantages supposed to be gained. And we have nothing to do with the question whether the Legislature directed the city to pay a high or low price for the privileges which it acquired, or made an improvident bargain thereof, if their value is of such a character that an absolute gift cannot be inferred.

Now, it is conceded by the argument upon the part of the appellant that the acquisition of the streets occupied by the railroad companies and the establishment of uninterrupted communication between the two sides of the city are matters of great value, but, it is contended, not of the value which the Legislature directed the city to pay. Into this inquiry we cannot enter.

It is further urged upon the part of the appellant that, while the act is substantially granting a new franchise and use to these railroads, it contains no provision for a conveyance by the roads to the city or even a quit-claim deed or release of anything they then owned. But this in no manner affects the question. It is undoubtedly true, as was so ably shown by the counsel for the appellant, that the use of the streets by the railroad company, being abandoned because of their right acquired for an elevated railroad, the land in the street formerly occupied by them naturally and legally reverted to the city for street purposes. The conditions remained the same whether there was a formal release or a release by operation of law. The railroad companies surrendered their rights and accepted a new franchise, and the Legislature authorized the city to pay them not to exceed a certain sum for so doing. As

already stated, we see no constitutional objection to such a provision under the circumstances disclosed in the case at bar.

The order should be affirmed, with costs.

Follett and Parker, *JJ.*, concurred.

Order affirmed, with costs.

COURT OF APPEALS.

EMILY TALBOT, Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondents.
} 151 N. Y., 155.

Argued October, 1896; decided December, 1896.

BARTLETT, *J.*

This action is brought to enjoin the defendant corpora-
(158) tions from maintaining or using the bridge over Fourth avenue on which Forty-eighth street crosses as a public highway and a certain protection wall adjacent to plaintiff's house in the same street; also to compel the removal of the bridge and wall.

In 1869 the plaintiff purchased a lot 250 feet west from Fourth avenue, on the north side of Forty-eighth street, and erected thereon a brown stone front house. Shortly after the erection of this house the New York and Harlem Railroad Company acquired title to all the land on the north side of Forty-eighth street, lying between plaintiff's premises and Fourth avenue; also a large amount of land on the south side of the street opposite the lot of plaintiff. On the 1st of April, 1873, the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railroad, extending from Forty-second street along Fourth avenue to the Harlem River.

In 1872 the Legislature passed an act (Ch. 702) entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York," for the purpose among others of rendering the same safe and convenient for persons crossing the same.

The act provided that the New York and Harlem Railroad Company should construct, at Forty-eighth street, a tunnel under the Fourth avenue for sidewalks and carriage ways, or a bridge over the same for a like purpose, and that the tunnel or bridge should be at least thirty-four feet wide. The act had for its general object the abolition of grade crossings to conserve the public safety, as it was contemplated to run trains from the Grand Central Station at Forty-second street to the Harlem River at a high rate of speed. It was a work

of public necessity, and involved a large expenditure, which was shared equally by the city of New York and the defendants.

The act appointed a board of engineersto execute, direct and superintend the construction of the improvements,
(159) to be called "The Board of Engineers of the Fourth Avenue Improvement."

This board was made up of five members, one of whom was the chief engineer of the board of public works of the city of New York for the time being, and another was the engineer of the New York and Harlem Railroad Company, and was authorized and directed to take entire charge and control of the work, and to prepare plans and specifications and an estimate of the expense, and file them in the office of the comptroller of the city of New York; they were also required to take an oath of office before a judge of a court of record and file it with the comptroller.

All these provisions were duly observed, and on the 30th of June, 1872, it was resolved by the board to authorize the construction of an iron bridge over the railroad tracks at Forty-eighth street. On the 25th of July, 1872, the board awarded a contract for this work to the Watson Manufacturing Company, in accordance with plans, etc., duly filed, and directed the New York and Harlem Railroad Company to execute the contract with that company. This was done, the bridge was constructed, and is the one complained of by the plaintiff. The bridge has approaches on its westerly side commencing opposite to the eastern boundary of plaintiff's premises and ascending upon the lines prepared by the board of engineers until they meet the iron structure spanning the avenue.

The bridge is thirty-four feet wide as the act requires, and is placed on the south side of the street, the latter being about sixty feet in width, thus leaving the north sidewalk and a strip of the surface roadway unoccupied by the new structure. In order to close this side of the street and prevent those traveling upon Forty-eighth street from injury in attempting to cross the railroad tracks at grade, and as a part of the official plan as filed, a wall of brick was constructed eight feet three inches high and about thirty-one feet long, beginning
(160) at the southeasterly corner of plaintiff's house, and extending over the discontinued portions of the sidewalk and roadway to the corner of the bridge structure.

The trial court found that the bridge had been used since its construction as a public highway both for carriages and foot passengers, and that its approaches have been kept paved and in order and the bridge lighted ever since by the corporation of New York. It is further found that the corporation defendants have not had the custody of, or maintained the

bridge or the wall, or used the bridge; that they have in several instances replaced bolts to prevent danger to passing trains, and repainted the iron work which had been disfigured by the smoke of the engines.

It is also found that the board of engineers were able and skillful men, and that the work was examined by them after completion and accepted as duly performed under the provisions of the act of 1872.

It was under this condition of affairs, and nearly twenty years after this work was begun, that the plaintiff instituted this suit, alleging she had suffered great damage by reason of the bridge and wall.

The trial court found that the effect of the wall was to prevent, to a certain extent, access of a carriage to the front steps of plaintiff's house, and that in the early morning it cast a slight shadow into the front basement room, but later in the day the reflection from the wall increased the light.

It was also found that the bridge itself did not injuriously affect the light, air or access to plaintiff's house; that the damage caused by the wall was inconsiderable, and that it could not be determined from the evidence given how much in money that damage had been, or how much resulted from the lawful occupation of its own land by the railroad company adjoining and opposite to the plaintiff's premises, and not forming a part of Forty-eighth street.

It is not necessary, however, to determine whether the court below properly disposed of the question of damages upon the evidence, as we are of opinion that the law, as applied
(161) to the admitted facts, imposes no liability on the defendants.

We have in this case a change of grade of one of the public streets of the city of New York, the fee of which was in the city, by command of the legislature, under the supervision of a board of engineers of its own creation.

The defendant company acted as the agent of the board, and conducted the work according to its plans and under its supervision and control. On the completion of the work and its acceptance by the board it has been maintained and used by the city of New York ever since as a part of its highway system.

These facts show that even if the plaintiff has suffered damage, and can compel removal of the wall and bridge, the defendants are not liable in damages, nor would a decree of removal against them be of any force or effect, as they are not in possession of the bridge, or maintaining or using the same.

We think, however, that the facts show no liability on the part of any one.

While it is a general rule that abutting owners upon city

streets, although not vested with the fee, are entitled to the use of the street for access and other purposes, of which they cannot be deprived without compensation, yet this right is subject to important exceptions. In the case of *Reining* v. *N. Y., L. & W. R. Co.* (128 N. Y., at page 165), Chief Judge ANDREWS, in a discussion of these exceptions as applied to a very different state of facts, said:

"The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change was made under lawful authority. This, it is held, is not a taking of the abutting owners' property, and the injury requires no compensation."

In the case at bar there is no closing of the street, nor
(162) is the plaintiff excluded therefrom within the principle of the *Story* case (90 N. Y. 122).

The abolition of the grade crossing was required for the public safety, and the wall shutting out the traveler from the north sidewalk and strip of roadway leading down to the railroad tracks was a necessary part of the work ordered by the legislature.

This wall stands upon the property of the defendants and the city.

The proposition that in this case there is no taking of private property for public use under the provisions of the Constitution and that the acts complained of are *damnum absque injuria*, has been frequently sustained by this court. (*Radcliffe's Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Bellinger* v. *N. Y. C. R.R. Co.*, 23 N. Y. 42; *Moyor* v. *N. Y. C. & H. R. R.R. Co.*, 88 N. Y. 351; *Uline* v. *N. Y. C. & H. R. R.R. Co.*, 101 N. Y. 98; *Atwater* v. *Trustees, etc.*, 124 N. Y. 602.)

The Supreme Court of the United States has also approved the rule. (*Smith* v. *Corporation of Washington*, 20 How. [U. S.] 135; *Transportation Company* v. *Chicago*, 99 U. S. 635, 641.)

The appellant discusses other questions which need not be considered in detail, as they have no direct bearing upon the main and controlling point in this case. The plaintiff's contention that the defendants unlawfully occupy that portion of Forty-eighth street which is barred off from public use by the bridge and wall is not relevant to this controversy; it is a question between the defendants and the city of New York if the latter's property rights have been invaded.

The bridge approach and wall were located by the state through its agents; and as to the strip of land shut off from public use, it was in no legal sense a closing of the street, but a necessary provision to turn the tide of travel upon the sidewalks and roadway over the bridge. There is no finding, as contended, that this wall during the last ten years, or
(163) for any other period of time, has been maintained by either of the defendants, but there is an express finding to the contrary.

It is not necessary to examine the question of the Statute of Limitations.

We agree with the learned court below that the plaintiff established no cause of action, and that the complaint was properly dismissed on the merits.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

Court of Appeals.

HANNAH CONABEER, Appellant,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company and The New York and Harlem Railroad Company, Respondents.
} 156 N. Y., 474.

Argued June, 1898; decided October, 1898.

Appeal from a judgment of the late General Term of
(476) the Supreme Court in the first judicial department, entered January 26, 1895, affirming a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on the merits on trial at Special Term.

This action was commenced on the twentieth of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof.

In 1807, by chapter 115 of the laws of that year, three commissioners were appointed who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April first, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of the width of sixty feet, and Fourth avenue of the width of one hundred feet. That act also provided that the map, plans and surveys so made and filed should be final and conclusive as to the mayor, aldermen

and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map these streets remained unopened and had no existence, except that which resulted from their being designated as such on the map.

In 1831, by a special act of the legislature (Ch. 263),
(477) the New York and Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city.

The provisions of this act were complied with by the New York and Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its road over Fourth avenue. It obtained
(478) the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor December 22, 1831.

At that time the locality which included the premises in

question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the eighteenth of January, 1832, Mrs. McGown conveyed to the New York and Harlem Railroad Company and its successors a portion of the land owned by her, consisting of twenty-four feet of land running through the center of Fourth avenue between Ninety-seventh and One Hundredth and Sixth streets for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much farther beyond the line of the premises granted as might be necessary to support its work, not, however, to extend beyond the width of the avenue, which was one hundred feet.

Some time anterior to 1835, the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased sixteen feet on each side, and accommodated two additional tracks.

In 1835, the matter of widening Fourth avenue from one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to one hundred and forty feet.

Fourth avenue was not opened until nearly twenty years after the construction of the defendants' road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each
(479) of the lots across which it passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York and Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legisla-

ture passed an act to improve and regulate the use of Fourth avenue in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels and openings as were therein described. It provided that from Fifty-sixth to Ninety-sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose fo facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclusively for
(480) the uses and purposes of the railroad company, and that the legislature might at any time alter, amend or repeal that act.

This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that point consisted in taking down the old viaduct and erecting a new one of the same height, but fifty-six feet wide. It was completed in 1873, in which year the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railway for four hundred and one years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, fourteen years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832 when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building used as a dwelling house. Since June, 1887, she has been the owner in

fee and in possession and occupancy of the premises thus purchased.

Since the lease to the New York Central and Hudson River Railroad Company it has maintained and operated the railroad upon such viaduct and runs thereon a large number of trains during the day and night drawn by locomotives, and in its operation steam, smoke, noxious and unpleasant gases, vapors, coal, soot, cinders, ashes and sparks have been and are frequently emitted from such locomotives which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady and natural passage of light is interrupted, and dark shadows and
(481) bright flashes of light are produced. The viaduct and railway structure are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use and operate a railroad thereon.

The viaduct is about forty feet from the building line upon Fourth avenue. Of this, twenty-five feet in width on each side are used as a roadway for teams, carriages and other vehicles, and fifteen feet as a sidewalk. The street-line is now forty-two feet from such viaduct, while before the widening of Fourth avenue the street line was only thirty-eight feet from the viaduct as first constructed.

Joseph Ullman for appellant.

Ira A. Place, Alexander S. Lyman and *Hamilton Harris* for respondents.

(482) MARTIN, *J.* It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment to the full
(483) width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no

way interfere with the proper exercise of that right by the railroad company during its continuance.

The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light and air were obstructed, except in the manner stated. Therefore, the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would.

It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's and the de-
(484) fendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain and operate its road in the center of the avenue where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and was upon her part an irrevocable grant to the New York and Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances or injuries resulting from the operation of the road.

When that right was granted, Fourth avenue was but one hundred feet in width, and the viaduct or embankment first constructed by the defendants was at most but thirty-eight feet from the exterior street line. Since that time the street

has been widened to one hundred and forty feet, so that the street line is now forty-two feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by non-user unless there is a loss of title in some of the ways recognized by law. Mere non-user, however long continued, does not create an abandonment. (*Welsh* v. *Taylor*, 134 N. Y. 450; *Haight* vs. (485) *Littlefield*, 147 N. Y. 338.) Therefore, as between the plaintiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt, and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendant effected such a release and abandonment is obvious. (*White* vs. *M. R. Co.*, 139 N. Y. 19; *Foote* v. *M. E. R. Co.*, 147 N. Y. 367; *Ward* vs. *M. E. R. Co.*, 152 N. Y. 39.)

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the Laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorporation, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights

were reserved and granted, subject to the approval of the mayor, aldermen and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred, the New York and Harlem Railroad Company pur-
(486) chased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street and opened on each side of the defendants' railroad streets for teams and foot travelers as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire the title of the New York and Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she nor her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting a plan
(487) for the improvement of Fourth avenue. By that act the railroad corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers

of the municipality were forbidden to obstruct the improvement or the use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose and to the width of the present structure, so that, unless the plaintiff has some right in the street which is superior to that of the defendants and to the combined power of the legislature and municipalty, this action cannot be maintained.

It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining and opening its railroad was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown and the combined authority of the legislature and municipality. "The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." (*Wormser* v. *Brown*, 149 N. Y. 168, 171.) As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequential damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. (*Fobes* v. *R., W. & O. R. R. Co.*, 121 N. Y. 505, 518.) Where a railroad is built in a public street or
(488) highway with proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 112.)

The cases of *Reining* v. *N. Y., L. & W. R. R. Co.* (128 N. Y. 157) and *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108) in no way impair the doctrine of the *Uline* and *Conklin* cases. Nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that before an established street can be closed against such owner he would be entitled to compensation. In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used

as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York and Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee to the twenty-four feet of land deeded by Mrs. McGown to the New York and Harlem Railroad Company. In whomsoever the
(489) mere naked title to the twenty-four feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiffs' grantor, was not intended to be affected, but to remain in the defendants as a protection to their right, so long as the road was operated in that avenue and the time mentioned in the grant had not expired.

Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank Note Co.* v. *N. Y. E. R. R. Co.* (129 N. Y. 252) this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air and access. In *Wormser* v. *Brown* (149 N. Y. 163) this court determined that an interference with the view from the plaintiffs' windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originated. *In People ex rel. N. Y. & H. R. R.* v. *Commissioners of Taxes* (101 N. Y. 322) the judgment of this court was to the effect that the tunnels, tracks, superstruc-

ture, substructures, stations, viaducts and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in view of the fact that the city was forbidden to obstruct the improvement or the use of Fourth avenue above Forty-second street for that purpose. Under the circumstances of this
(490) case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from twenty-six to fifty-six feet was an additional burden upon the plaintiff's land, and, therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties and covered by her grant.

Moreover, when the plaintiff purchased her premises, the defendants' viaduct had existed for many years, had occupied the entire portion of the street where it now stands, and
(491) was used substantially as when this action was commenced. She purchased the premises with full knowl-

edge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and, hence, lost nothing by being deprived of any of her otherwise appurtenant easements.

Under these circumstances we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion.

The judgment should be affirmed, with costs.

All concur, except PARKER, *Ch. J.*, not sitting.

Judgment affirmed.

Court of Appeals.

MARY J. LEWIS, Appellant and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD, Company, *et al.*, Respondents and Appellants,
Impleaded with the NEW YORK, NEW Haven and Hartford Railroad Company, Defendant.
} 162 N. Y., 202.

Argued January, 1900; decided February, 1900.

(218) VANN, *J.*: The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the Harlem Com-
(219) pany, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro., Sec. 369; *Baker* v. *Oakwood*, 123 N. Y., 16.)

The situation, when the Harlem Company entered Fourth

avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself. (*Conabeer* v. *N. Y. C. & H. R. R.R. Co.*, 156 N. Y., 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of
(220) its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro., Sec. 368; Code Pro., Sec. 81; 2 R. S., 293, Sec. 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the in-

tention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt* v. *Ogden*, 1 Johns., 156; *Smith* v. *Burtis*, 6 Johns., 197; *Jackson* v. *Johnson*, 5 Cow., 74; *Jackson* v. *Brink*, 5 Cow., 483; *La Frombois* v. *Jackson*, 8 Cow., 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend., 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y. 108; *Doherty* v. *Matsell*, 119 N. Y., 646; *Kneller* v. *Lang*, 137 N. Y., 589; *DeLancey* v. *Piepgras*, 138 N. Y., 26; *Heller* v. *Cohen*, 154 N. Y., 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss., 380; Am. & Eng. Encyc. of Law (2nd ed.), 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that
(221) the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street wherever the city required it. It entered under a licence and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon a deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y., 458). The city did not

know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a land owner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the
(222) period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." *Flora* v. *Carbean*, 38 N. Y., 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y., 263; *Parker* v. *Foote*, 19 Wend., 313). When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid
(223) upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision

upon grounds equally tenable in either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 135 N. Y., 341, 345; *Lord* v. *Atkins*, 138 N. Y., 184, 191; *Haight* v. *Littlefield*, 147 N. Y., 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff v. Paddock*, (224) 130 N. Y. 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements [4th ed.] 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, Sec. 160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as

to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim
(225) no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v.*

Calkins, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Stiles v. Hooker*, 7 Cow. 266.) As was said by Judge Andrews in *Prentice v. Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled
(226) to recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater v. Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner v. Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by
(227) the railroad nor even by the city, but by an independent board in the creation of which the defendant

had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R.R. v. Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly, they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass on the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the
(228) lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced.

Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohn* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R.R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent (229) agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R.R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R.R. Co.*, 28 App. Div. 379, and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R.R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R.R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to

decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

Parker, *Ch. J.*, Bartlett, Martin, Cullen and Werner, *JJ.*, concur; Gray, *J.*, not sitting.

Judgment affirmed.

Court of Appeals.

CHARLES WELDE, Respondent
vs.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants, Impleaded with Others.

168 N. Y., 597.

Argued April, 1901; decided October, 1901.

O'BRIEN, *J.:*

(598) The plaintiff is the owner of real property abutting upon Park avenue in front of the railroad operated by the defendants. The Harlem railroad was incorporated in the year 1831, but not constructed until the year 1837. Since that time various changes have been made in its roadbed and structure as well as in the street through which it passes. The questions involved in this appeal are to be determined by the findings of the court which appear in the record and which do not appear to be assailed by either party. The case is presented to us upon these findings. and the only question that we are now concerned with is the proper legal conclusion to be drawn from the facts so found.

What is now Park avenue was laid out on a map as early as the year 1807 to the width of one hundred feet. Subsequently, under a statute passed in 1837, this map was amended and the street as thus laid out was widened so as to constitute an avenue one hundred and forty feet in width; but the street was not actually opened and laid out as such until after the year 1850. It was then opened to the public as a street and subjected to the control of the municipal authorities, and has ever since remained a public street one hundred and forty feet in width, at least from Thirty-fourth street to the Harlem river. The defendants' railroad is constructed and operated in this street, and has been for over sixty years. In January, 1832, one Isaac Adriance, the plaintiff's remote grantor, then

owned the land described in the complaint and the land comprising what is now the bed of Park avenue or the street in question. At that time he executed and delivered to the Har-
(599) lem Railroad Company a deed of a strip of land twenty-four feet in width in the center line of this avenue from the southerly side of One Hundred and Twenty-fourth street to One Hundred and Twenty-seventh street, "together with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted as may be necessary to support their works, not, however, extending beyond the width of the avenue." As the avenue was then one hundred feet wide, that was the utmost extent of the grant to the railroad, and it is conceded that whatever rights the defendants acquired under this grant may be asserted against the plaintiff, who has succeeded to the title of Adriance and is bound by any consent or conveyance by him for railroad purposes. It will be seen by the terms of this grant that the railroad was authorized, when necessary, to support the work, to place an embankment in the street to the width of one hundred feet at the bottom in order to procure a proper slope. It is also apparent that wherever it was necessary to make rock cuts or excavations through high ground, that the railroad was authorized to make excavations one hundred feet in width at the surface of the ground, or at least if that was necessary in order to give the proper slope to the excavation. The question arises as to the proper construction of this conveyance. It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the one hundred feet. Whether the reasonable and practicable construction of this grant is that the railroad acquired thereby the consent of the property owner to the construction and maintenance of a railroad in the street as then laid out to the width of one hundred feet, or is limited to less than that by other considerations, is a question that would appear to be involved in the case, but may not be necessary to decide in view of the condition of the present record.

This action was commenced on the tenth day of October,
(600) 1895, and at that time, or at the time of the trial, the defendants' railroad was operated in Park avenue upon a steel viaduct structure eighty-two feet wide. It is a structure for four railroad tracks, supported upon five rows of columns, the outer rows of columns being placed substantially along the curb line of the avenue. Longitudinal plate girders were erected over the supporting columns so that the structure, or more properly speaking the columns, were about twelve feet and ten inches distant from the plaintiff's house line. The

main structure is entirely within the limits of the street as originally laid out to the width of one hundred feet, but as the girders extend beyond the main structure and are supported by columns at the curb line of the street, these columns or some of them are beyond the original street lines, but within the lines of the street as subsequently widened to one hundred and forty feet. Prior to the time that this structure was erected the railroad was operated in a rock cut at this point about sixty-two feet in width. The present structure was erected by a commission appointed by an act of the legislature, for the purpose of improving the street and enabling the public to use it to the full width by elevating the railroad *structure at a proper height* from the surface of the street. The statute which authorized this change in the operation of the railroad is chapter 339 of the Laws of 1892. It appears from the findings that this change was expressly directed by the statute and was the act of the state itself through this commission, the railroad company simply paying a portion of the expense in the form of an assessment. This was the situation, as disclosed by the findings, at the time of the commencement of this action. And an examination of the complaint shows that the action was commenced upon the theory that all these changes were made by the railroad company itself, whereas the trial court found that they were made by the commission under the statute, and that the railroad company could not be subjected to any liability in consequence of anything done by this commission. By chapter 594 of the Laws of 1896, the act of 1892, above referred to, was amended, and the defendants were required to erect and maintain a station at One Hundred and Twenty-fifth street upon a modified structure, the plans for which are particularly specified in the statute. The act directed the railroad to reduce the width
(601) of the main structure to eighty-two feet, as it now is. The structure erected by the commission was much wider. The reason for thus directing the structure to be narrowed was, doubtless, to furnish proper egress and ingress from the station to the trains. Whatever the purpose was, the railroad complied with the mandate of the statute and made the changes precisely in the manner therein specified, and this is the only act which, according to the findings, is to be attributed to the defendants. Since February 16th, 1897, the defendants' trains have been operated on this four-track viaduct structure, as they now are, and so far as appears that was the earliest date of the use of this structure by the defendants. The findings of the court, as they appear in the present record, naturally suggest the following questions:

(1) Did the Adriance deed, before referred to, operate as a consent by the plaintiff's predecessor in title to the mainte-

nance and operation of the railroad in front of his premises in this street covering a space not to exceed one hundred feet wide?

(2) Does the present viaduct structure, so far as it occupies this one hundred feet space, constitute any trespass or invasion of the plaintiff's property rights, and, if so, to what extent? (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

(3) In view of the grant from the plaintiff's predecessor in title, already referred to, and the acts of the legislature above mentioned, is this viaduct structure, upon which the railroad is operated, rightfully and lawfully in the street?

(4) This structure having been erected under the authority of the state itself, in a public street, in order to improve the street for public travel, can the plaintiff maintain an action to enjoin the operation of the railroad, or to recover damages against the defendants, in consequence of the existence of the structure, or its use by the defendants?

(5) The structure, including the changes made subsequent to the year 1896, having been erected in pursuance of the command of the legislature and in precise conformity with the plans and specifications indicated in the statute, has the plaintiff any right of action against the defendants to enjoin the operation of the railroad, or to recover damages, in so far as the structure exists within the original limits of the street, that is to say, within the one hundred feet? (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis Gas*
(602) *Light Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 N. Y. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 N. Y. 266, 478; *Hill* v. *Managers of Met. Asylum District*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Trauman* v. *London, Brighton & S. C. R'way Co.*, L. R. [25 C. H. Div.] 423.

As we are of opinion that there must be a new trial of the case for the reasons which will be presently stated, and as it is possible that the findings may be changed, we do not deem it necessary nor timely to discuss these questions. The facts as they now appear in the record and in the findings of the trial court may possibly be modified hereafter, and, therefore, we leave these questions for consideration when they are necessary to a decision of the case. While the trial court found that this structure was erected by the commission in pursuance of the statute, it did not find expressly whether it was a lawful structure or not, or whether its construction or the operation of the railroad upon it was an invasion of any of the plaintiff's property rights. It is true that since it awarded rental and permanent damages to the plaintiff it might be that the learned trial court was of opinion that the

structure, or at least some part of it, was an invasion of the plaintiff's rights of property. The learned trial judge decided in substance that the railroad was entitled to occupy the street for railroad purposes to the width of sixty-one feet and eight inches, and this proposition seems to have been based on the fact that that was the width of the rock cut in which the train was operated prior to the changes herein indicated. It was not decided whether the defendant was entitled to the use of the street beyond these limits under the grant from the original owner. It may be inferred from the result of the decision that the learned trial judge was of the opinion that the present structure, in so far as it extends beyond the width of the original rock cut, is an unlawful structure and an encroachment upon the plaintiff's rights, although that is not expressly stated in the decision. The learned trial judge, however, found that from April, 1893, to the time of the
(603) trial, the plaintiff's premises had produced an income less by seventy-two hundred dollars than they would have produced if the improvements and changes in Park avenue and in the defendant's railroad structure, as required by chapter 339 of the Laws of 1892 and the amending acts, had not been made; that this loss of income had not been uniform, but had been greater during the years 1894, 1895 and 1896, when the work of erecting that part of the structure which was to be devoted to the station was done, and when the original structure was in part taken down and the modified structure erected and the second station finished and completed. Now all this work, except that of narrowing the structure under the act of 1896, was done, not by the defendants, but by the state through the commission already mentioned, and as we have seen the learned trial judge held that the defendants were not liable for any damage resulting from the action of that commission in erecting the structure. All that the defendants did was to narrow the structure and build a station in the street under the express direction of the legislature contained in the act of 1896. But it is quite apparent that since the learned trial judge awarded to the plaintiff just seventy-two hundred dollars as rental damages, he must have held the defendants liable for the act of the commission in changing the street and erecting the viaduct structure. Very few, if any, of the injurious acts alleged in the complaint have been found by the learned trial court, and such acts of the defendants, as appear in the findings, commanded and contained in the law of 1896, in the modification of the structure by diminishing its width, all occurred subsequent to the commencement of the action. But it may be that the course of the trial justified the court in finding the facts as they existed at the date of the trial, although all these

facts so far as they attributed any interference by the defendants with the plaintiff's light, air and access, occurred subsequent to the commencement of the action.

We think that the judgment must be reversed and a new trial ordered, with costs to abide the event.

PARKER, *Ch. J.*, MARTIN and LANDON, *JJ.*, concur; BARTLETT, VANN and CULLEN, *JJ.*, concur in result.

Judgment reversed, etc.

Court of Appeals.

GUSTAV R. FRIES, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

169 N. Y., 270.

Argued April, 1901; decided December, 1901.

O'BRIEN, *J.*:

The plaintiff is the owner of a three-story frame (273) building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of (274) much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named

the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-nine feet wide. Said work was done under the supervision of the Board
(275) for Park Avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on February 16th, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that

statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act of the

(276) defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was

but a consequence of the improvement for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, it is held to be *damnum absque injuria*. (*Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, (277) 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id. 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dis.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423.) The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. (*Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that (278) alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein* case, the other

cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603.) The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation pro-
(279) ceeded have no application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y., 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first case, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be con-

trolled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties appealed from a small judgment, and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far
(280) as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the State under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff

was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y., 559; *Hine* v. *N. Y. El. R. R. Co.*, id., 571; *Kearney* v. *Met. El. Ry. Co.*, 129 id., 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id., 393).

(281) It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then

it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on
(282) another avenue where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J.:

Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an
(283) action for its consequences whatever they may be, unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are

applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R.R.* (23 id. 42); *Selden* v. *D. & H. C. Co.* (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R.R. Co.* (50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R.R. Co.* (101 id. 98, 107); (284) *Conklin* v. *N. Y., O. & W. Ry. Co.* (102 id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R.R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.* (135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot* v. *N. Y. & H. R.R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R.R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases.

While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of a viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the
(285) general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'Brien, I still think that the decision about to be made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

Cullen, *J.* (dissenting).

I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R.R. Co.*, 151 id. 155.) 2. That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R.R. Co.*, 50 N. Y. 206; *Forbes* v. *R. W. & O. R.R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appro-

priation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R.R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the
(286) grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y. L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other, which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*. That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he

is entitled to compensation. To relieve the defendant
(287) from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y., 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In
the *Conabeer* case the trial court found as a matter of
(288) fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the main-

tenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject I should be content to confine myself
(289) to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants and Respondents.
} 173 N. Y., 549.

Argued October, 1902; decided February, 1903.

PARKER, *Ch. J.:*

The facts in this case present the same question that was before this court in the *Lewis Case* (162 N. Y. 202)
(551) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have

been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra.*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made necessary a change in the grade of defendant's railroads, and the act provided that such changes should be made as
(252) soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the State, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better

stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater* v. *Trustees of Vil. of Canandaigua*, 124 N. Y., 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want (553) of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in the late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their accept-

ance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, (554) briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'Brien and Judge Martin. In the course of Judge O'Brien's opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the

improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements
(555) interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*"

Judge MARTIN states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the grade
(556) of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point.

There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as
(557) it did, without compensation to the abutting owners.

Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting).

This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground that he was limited in his recovery by an improper rule
(558) as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public

street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the
(559) Harlem Railroad Company 24 feet in Fourth Avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y., 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs* vs. *Phillips*, 103 N. Y., 77). Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth Avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth Avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth Avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new state of affairs as to the grade of the tracks, both on viaducts
(560) and in cuts, which were not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1893 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park Avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park Avenue above 106th Street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad,*. and for the construction of a
(561) new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge*, and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th Street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by sec-

tion thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th Street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or (562) negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed

any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation,
(563) and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of *Reining* v. *N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here, and that the decision in the
(564) *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated

railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting). I concur in the opinion (565) of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, *JJ.*, concur with PARKER,

Ch. J.; BARTLETT, *J.*, reads dissenting opinion, and CULLEN *J.*, concurs in memorandum; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

JOHN KEIRNS, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 173 N. Y., 642.

Argued November, 1903; decided February, 1903.

Per Curiam.—Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R.R. Co.* (169 N. Y., 270), and *Muhlker* v. *N. Y. & Harlem R.R. Co.* (173 N. Y. 549).

VANN, *J.* (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R.R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries* v. *N. Y. & Harlem R.R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the com-
(643) pany's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed; to cause to be

erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners, and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker vs. N. Y. & Harlem R. R. Co.*, 173 N. Y., 549.)

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, *Ch. J.*, BARTLETT, HAIGHT, MARTIN and WERNER, *JJ.* (and VANN, *J.*, in memorandum), concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

HEDEWIG KRIETE, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

175 N. Y., 484.

Argued May, 1903; decided June, 1903.

Per Curiam:

We decide on authority of the *Fries Case* (169 N. Y., 270), and the *Muhlker Case* (173 N. Y., 549), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant.

The constitutionality of the statute being questioned, we hold (1) that it does not violate the State Constitution, (2) that it does not offend against that provision of the 14th amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article 1 of the Federal Constitution forbidding the impairment of the obligation of a contract.

The judgment should be reversed and the complaint dismissed, without costs.

PARKER, *Ch. J.*, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, *JJ.*, concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

NORA DOLAN *et al.*, Respondents,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Appellants, Impleaded with *Another.*
} 175 N. Y., 367.

Argued May, 1903; decided June, 1903.

HAIGHT, *J.*:

This is one of a group of actions brought by the abutting owners on Park avenue in the city of New York to restrain (368) the maintenance and operation of the defendants' railroads upon the viaduct structure through that street, or, as an alternative, to recover damages resulting to the fee and rental value of the premises.

The plaintiffs' premises are situated on Park avenue, between 124th and 125th streets, abutting upon the de- (369) fendants' railroad stations at 125th street. The station is upon the viaduct structure, widened out so as to provide a suitable platform on which passengers may enter or alight from trains, and is reached by stairways from the street.

The complaint in this action demands judgment that the defendants be enjoined from maintaining a station, platform and appurtenance thereto in front of the plaintiffs' premises, as well as that of the elevated railroad structure. The trial court awarded judgment in favor of the plaintiffs for fee and rental damages, which included the damages suffered by reason of the operation of the defendants' trains upon the viaduct. For this reason the judgment must be reversed, upon the authority of *Muhlker* v. *New York & Harlem Railroad Co.* (173 N. Y. 549) and *Fries* v. *New York & Harlem Railroad Co.* (169 N. Y. 270). The only question remaining to be determined upon this review is as to whether the complaint should be dismissed or a new trial granted, and the determination of that question involves an inquiry as to whether the plaintiffs can recover damages by reason of the construction and maintenance of the defendants' depot at that place.

Prior to 1892, the defendants had acquired the right to maintain and operate their railroad through Park avenue in a subway or cut bounded on either side by walls of masonry. This not only prevented the use of a large portion of the street for municipal purposes, but it also seriously interfered with the passage of teams between those portions of the city

lying on opposite sides of Park avenue. Under these circumstances the legislature enacted chapter 339 of the Laws of 1892. By this act a board was created to erect a steel viaduct through Park avenue from 111th street to the Harlem river, and after its completion the defendants were required to run their trains over the viaduct. The cut in 125th street was then required to be filled, and the surface paved.

(370) The evident purpose of this legislation was to open up Park avenue as a street through its entire width, and to facilitate travel across the same between the portions of the city lying on either side of the street. This was a public improvement effected through a governmental agency, over which the defendants were given no voice or power to control the operations of the board. It was consequently held in the cases to which we have referred, that the defendants were not liable for the damages resulting to abutting property owners from the operations of their trains on the viaduct. The same statute further "authorized and permitted" the defendants, at their election, to erect station houses on both sides of the railroad at 125th street with platforms extending from the north line of 124th street to the south line of 125th street. This statute was amended by chapter 594 of the Laws of 1896, in which the defendants were not only authorized but *directed* to erect and maintain such stations, specifically specifying the size, place and character of the structure.

It is contended on behalf of the defendants that inasmuch as they were compelled to construct the stations, under the amendment of the act, they are relieved from liability for damages to abutting owners of property, upon the same theory and for the same reasons that they have been relieved from liability for the construction of the viaduct. But we think there is a controlling distinction between this and the former cases, and that our decisions in the *Fries* and *Muhlker* cases have no application. In those cases, as we have seen, the government built the structure for the purpose of effecting a great public improvement. In this case the government requires the defendants to provide suitable and proper facilities to enable their patrons to safely and conveniently enter and alight from their trains. A railroad corporation in accepting a charter from the state impliedly undertakes to afford reasonable and proper facilities for the transportation of passengers and freight, and if it neglects it may be compelled to discharge its duty in this regard. Under the General Railroad Law the construction and maintenance of depots is committed to the judgment of the railroad commission-

(371) ers, who are empowered to direct as to the station houses and terminal facilities that shall be provided.

Under the amendment of 1896 the legislature, so far as these defendants are concerned in Park avenue, has superseded the railroad commissioners, and has by act specified the character, size and location of the stations, and that is all. To our minds the situation is not different from that which would be presented if the railroad commissioners had required a depot and terminal facilities at any other point upon the defendants' lines. If, in complying with such requirements, additional land should be required, it would become the duty of the railroad company to acquire the same and pay therefor. So in the case under consideration. If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor. The station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies, under their implied contract with the state, to afford suitable and proper facilities for the accommodation of their own patrons.

While no damages could be awarded by reason of the construction of the viaduct, or of the operation of the trains of the defendants thereon, both fee and rental damages may be awarded, if suffered in consequence of the station houses. We consequently conclude that a new trial should be ordered.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment reversed.

Court of Appeals.

AUGUSTA A. KETCHAM, Respondent,
vs.
NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

177 N. Y., 247.

Argued January, 1904; decided January, 1904.

BARTLETT, *J.*:

This action is brought to recover fee and rental (248) damages of the defendants by reason of the erection of their passenger station at 125th street in the city of New York. The plaintiff's premises are situated on the southwest corner of Park avenue and 126th street, being a plot of seventy-five feet on Park avenue and ninety feet in depth, upon which are erected one-story buildings used for stores, said premises being known by the street numbers 1834, 1836 and 1838 Park avenue. The 125th street

station extends north to 126th street and is consequently in front of plaintiff's premises.

The plaintiff, according to the prayer of her complaint, seeks to perpetually enjoin the defendants from maintaining, continuing or using the elevated railroad structure and its appurtenances and the station, station platform, stair-
(249) ways and appurtenances, tracks, switches, ties, stringers, girders and rails in front of, over or adjacent to plaintiff's said premises, and that defendants be required forthwith to remove said railroad structure, etc., unless the defendants pay to the plaintiff such sum or sums as may be found to be the value of the easements of which the plaintiff has been deprived.

The trial court found (finding IV) that the defendants erected a passenger station at 125th street and Park avenue, a solid iron structure, in front of the plaintiff's premises, which was eventually modified so as to be eighty-two feet wide and twenty-three feet and three inches high.

Finding V reads: "By the adoption of plans for the station, and by the increase of the width and alteration of the structure for the sole purpose of accommodating the station, and by the work done by the defendants themselves or by their contractors, the defendants became parties to the process of construction at this point of the station buildings and appurtenances from the time of the commencement of the work in August, 1893, to its completion in November, 1897."

Finding IX reads: "The plaintiff has suffered damages by reason of the increase of inconvenience from the operation of trains *upon the viaduct structure* since the 16th of February, 1897, not including that from noise, and in the erection and maintenance of a passenger station at 125th street, *and the passing, starting and stopping of numerous trains thereat*, in the depreciation of the value of fee of her real estate in the sum of $11,500, and in the loss of rents from the 16th of February, 1897, down to the date of trial, in the sum of $5,500; the said sums * * * represent as to fee damages and rental damages, respectively, the net difference measured in money between the physical effect of the *former operation of the railroad* upon the premises in suit and the physical effects *produced by the new elevated structure, including the station and its appurtenances* and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic."

As this case is one of a large number involving the
(250) same situation, it is deemed proper to state what this court has already decided and to point out the one question which has been left open.

This court has decided that the steel viaduct in Park avenue, upon which the defendants' railroads are now operated, ex-

tending from 104th street to the Harlem river, was a public improvement effected through a governmental agency, and that defendants were not liable for damages resulting to abutting property owners from the maintenance of the structure or the operation of trains thereon. (*Muhlker* vs. *N. Y. & Harlem R.R. Co.*, 173 N. Y., 549; *Fries* vs. *N. Y. & Harlem R.R. Co.*, 169 N. Y., 270.)

It has also been decided "that the station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies under their implied contract with the state to afford suitable and proper facilities for the accommodation of their own patrons." (*Dolan* vs. *N. Y. & Harlem R.R. Co.*, 175 N. Y., 367.)

A single question is presented by this appeal, the defendants, appellants, contending that the findings of the trial court include, not only the damages, fee and rental, arising from the construction of the station at 125th street, but embrace damages produced by the new elevated structure, including the station and its appurtenances.

The plaintiff insists that, reading the fifth and ninth findings together, it is clear that the trial court limited the damages to the construction and operation of the station.

We are of opinion that the contention of the appellants must be sustained, as it seems to us clear, on a careful reading of the findings, that the trial court did not confine its award of damages to the erection and maintenance of the station building and appurtenances.

Finding IX distinctly states that the plaintiff "has suffered damages by reason of the increase *of inconvenience from the operation of trains upon the viaduct structure* since the 16th of February, 1897, not including that from noise, *and* in the erection and maintenance of a passenger station at
(251) 125th street, and the passing, starting and stopping of numerous trains thereat."

This finding further states, after fixing the fee and rental damages, that they represent "the net difference measured in money between the physical effect of the *former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic.*"

It is clear from the phraseology of this finding that the trial court did not confine the assessment of damages to the station and its appurtenances, but considered the former operation of the railroad upon the premises in suit and the physical effects

produced by the new elevated structure, including the station and its appurtenances.

In *Dolan* v. *N. Y. & Harlem R.R. Co.* (175 N. Y., 367), Judge HAIGHT, writing for the court, said (p. 371): "If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor."

This language is, in general terms, an indication of the rule of damages to be applied in these station-house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases.

If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN and CULLEN, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.

Supreme Court of the United States.

Nos. 202 and 203.—October Term, 1904.

202	Alice I. Birrell, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.
203	Patrick Kierns, Executor and Trustee of John Kierns, deceased, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	

[May 15, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

Plaintiffs in error are owners of property on Park avenue in the city of New York, and brought these actions in the Supreme Court of the county of New York against the defendants in error for damages for the erection of and for an injunction, against the continuance of the viaduct described in *Muhlker* v. *New York & Harlem Railroad Company et al.*, *ante*, page . The Supreme Court found that the viaduct and the operation of trains thereon were and had been from certain dates which were mentioned, a continuous trespass upon the easements of light, air and access appurtenant to the property of plaintiffs in error, and that they sustained damages, respectively, as follows: Birrell in the sum of $3,360, depreciation in the rental value of her property, and the sum of $7,050 damages to the fee; Patrick Kierns, as executor and trustee of John Kierns, deceased, in the sum of $1,296, depreciation of rental value of his property, and $2,525 injury to the fee. Money judgments were entered for the depreciation of the rental value of the respective properties, and it was decreed that unless the right was acquired by the defendants to maintain the structure and operate the railroad by the payment of the sums awarded for the damages to the fee, injunctions should become operative against the structure and railroad. The judgments were affirmed by the Appellate Division, but were reversed by the Court of Appeals. Upon the return of the cases to the Supreme Court judgments were entered dismissing the complaints and these writs of error were then sued out.

In the Birrell case the Court of Appeals contented itself with a simple reversal of the judgment; in the Kierns case a *per curiam* opinion was filed as follows:

"Judgment reversed and the complaint dismissed without costs upon the authority of *Fries* v. *New York & Harlem R. R. Co.*, (169 N. Y. 270,) and *Muhlker* v. *New York & Harlem R. R. Co.*, (173 N. Y.)."

Judge Vann filed a concurring opinion, which he concluded as follows:

"I concurred in the dissenting opinion of Judge Cullon in the Fries case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decieis* I am compelled to vote for reversal."

The Muhlker case came to this court and was reversed, *ante*, page . There are some differences in the facts in the cases at bar from that case, but none in our judgment which withdraw them from the principles there expressed. And, as we have seen, a substantial identity in the cases was pronounced by the courts of New York.

Counsel, it is true, have submitted some additional considerations based on the act of 1892 under which the viaduct was erected, and on other laws of New York, to which considerations we have given due attention, but we do not think they demand or would justify a change of our ruling.

It follows, therefore, that the judgments should be and they are hereby reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE, Mr. Justice WHITE, Mr. Justice PECKHAM and Mr Justice HOLMES dissent.

True copy.

Test:

Clerk Supreme Court, U. S.